DOCUMENT RESUME

ED 387 954 EC 304 308

| | |
|---|---|
| TITLE | Colorado Special Education Administrative Decisions 1992-. Supplement. |
| INSTITUTION | Colorado State Dept. of Education, Denver. Div. of Special Education Services. |
| PUB DATE | 24 May 95 |
| NOTE | 152p.; For the original compilation, see ED 359 710. |
| PUB TYPE | Legal/Legislative/Regulatory Materials (090) |
| EDRS PRICE | MF01/PC07 Plus Postage. |
| DESCRIPTORS | Acquired Immune Deficiency Syndrome; Ancillary School Services; Case Studies; Compensatory Education; Compliance (Legal); Confidentiality; Decision Making; *Disabilities; Discipline Policy; *Due Process; Educational Administration; Elementary Secondary Education; Extended School Year; *Grievance Procedures; *Hearings; Individualized Education Programs; Lawyers; *Legal Responsibility; Mainstreaming; Opinions; Preschool Education; Private Schools; Residential Schools; *Special Education; Student Evaluation; Student Placement; Transitional Programs |
| IDENTIFIERS | *Colorado |

ABSTRACT

This document is a compilation of Colorado Special Education Administrative Decisions issued in 1993 and 1994, including Impartial Hearing Officer decisions and complaint findings. Topics covered in the compilation include decisions on procedural safeguards, due process hearings, the extended school year, discipline (suspension and expulsion), free appropriate education, residential placement, private schools, least restrictive environment, student evaluation, confidentiality of information, related services, the individual educational plan, attorney fees, surrogate parents (the guardian ad litem program), human immunodeficiency virus and other health issues, qualified instructional personnel, infants and toddlers and other preschool handicapped children, graduation and exit, transitional programming, and compensatory services. The full text of each decision is preceded by a case summary which includes a listing of key topics, a statement of the issues, the decision and highlights of the decision, and highlights of the discussion. An index lists cases from 1988 through 1994 by key topics. (DB)

**********
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
**********

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

ED 387 954

# COLORADO

Special Education Administrative Decisions 1992- Supplement.

EC 304 308

PERMISSION TO REPRODUCE THIS
MATERIAL HAS BEEN GRANTED BY

N. Bolt

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)

BEST COPY AVAILABLE

# STATE OF COLORADO

**COLORADO DEPARTMENT OF EDUCATION**

201 East Colfax Avenue
Denver, CO 80203-1704
FAX (303) 830-0793

**William T. Randall**
**Commissioner of Education**
**Richard A. Laughlin**
**Deputy Commissioner**

TO: All Interested Persons

FROM: Colorado Department of Education
Special Education Services Unit

DATE: May 24, 1995

SUBJECT: Supplement to Special Education Administrative Decisions

---

Enclosed, please find documents which supplement your Special Education Administrative Decisions. These will go in the back of the red notebook labeled "Special Education Administrative Decisions 1992-".

An updated index is also enclosed. These pages should replace the current index contained at the front of the Special Education Administrative Decisions 1988-89 or later volume.

Please direct any questions you may have regarding the supplements or the original volumes to Kathi King at (303) 866-6819.

# INDEX

I. PROCEDURAL SAFEGUARDS

**Relevant State and IHO Due Process Decisions:**

Case No.: L94:119

Case No.: L93:110

Case No.: S93:105

Case No.: L93:105

Case No.: L92:115

Case No.: S92:115 (scope of review, meetings)

Case No.: L92:116

Case No.: L91:113

Case No.: S91:107 (burden of proof)

Case No.: S90:102 (appeals procedure and scope of review)

Case No.: L90:101 (notice; parent involvement; impartiality of hearing officer; and extension of forty-five day timeline)

Case No.: S90:101 (notice; parent involvement; and independent evaluation)

Case No.: S90:100 (scope of due process requirements and standard of review)

Case No.: L89:103 (stay-put provision; procedures of hearing, notice; and right to attorney representation)

Case No.: S89:103 (stay-put provision and scope of review)

Case No.: L89:102

Case No.: S89:102 (procedural rights and standard of review)

Case No.: L89:101 (independent educational evaluation)

I. PROCEDURAL SAFEGUARDS (continued)

Case No.: L88:101 (notice)

Case No.: S88:101 (burden of proof and standard of review)

Case No.: L89:100 (stay-put provision; and authority of hearing officer)

**Relevant State Complaint Recommendations:**

Case No.: 94.514

Case No.: 94.511

Case No.: 94.509

Case No.: 93.516

Case No.: 93.511

Case No.: 93.507 (access to records)

Case No.: 92:505 (notice and timeliness of staffing)

Case No.: 91:515 (notice and meeting times)

Case No.: 91:513 (notice)

Case No.: 91:505 (parental consent and evaluations)

Case No.: 91:501 (consent and evaluation)

Case No.: 90:509 (evaluations and special education referral)

Case No.: 89:505 (notice)

Case No.: 88:508

Case No.: 88:505 (notice and stay-put provision)

Case No.: 88:502

II. DUE PROCESS HEARINGS

**Relevant State and IHO Due Process Decisions:**

Case No.: S90:102 (appeals procedure and scope of review)

Case No.: L90:101 (notice; impartiality of hearing officer; and extension of 45 day timeline)

Case No.: S90:101 (standard of review)

Case No.: S90:100 (scope of due process request and standard of review)

Case No.: L89:103 (stay-put provision; procedures of hearing; notice of procedural safeguards; and right to attorney representation)

Case No.: S89:103 (stay-put provision and scope of review)

Case No.: S89:102 (burden of proof, procedural rights and standard of review)

Case No.: L88:101 (burden of proof, notice)

Case No.: S88:101 (burden of proof and standard of review)

Case No.: L88:100 (authority of hearing officer)

**Relevant State Complaint Recommendations:**

Case No.: 89:505 (notice)

Case No.: 88:505 (notice and stay-put provision)

Case No.: 88:502

III. EXTENDED SCHOOL YEAR

**Relevant State and IHO Due Process Decisions:**

Case No.: L92:115

Case No.: L91:108

Case No.: S89:102

Case No.: S89:101

III. EXTENDED SCHOOL YEAR (continued)

**Relevant State Complaint Recommendations:**

Case No.: 94.514

Case No.: 93.508

Case No.: 92:506

Case No.: 91:513

Case No.: 91:511

Case No.: 90:505

Case No.: 88:511

IV. DISCIPLINE (suspension and expulsion)

**Relevant State and IHO Due Process Decisions:**

Case No.:L94:119 (expulsion and behavior related to ADD)

Case No.: L94:107

Case No.: L89:100 (behavioral problems)

**Relevant State Complaint Recommendations:**

Case No.: 94.504

Case No.: 93.501

Case No.: 89:503 (suspension/expulsion and behavior management plans)

V. FREE APPROPRIATE PUBLIC EDUCATION

**Relevant State and IHO Due Process Decisions:**

Case No.: S93:110

Case No.: L93:110

Case No.: L92:105

Case No.: L92:115

Case No.: S92:115

Case No.: L91:114

Case No.: L91:113

Case No.: L91:108

Case No.: S91:107

Case No.: L91:107

Case No.: L90:101

Case No.: S90:101

Case No.: L89:103

Case No.: S89:103

Case No.: L89:102

Case No.: S89:102

Case No.: L89:100

Case No.: L88:101

Case No.: S88:101

V. FREE APPROPRIATE PUBLIC EDUCATION (continued)

**Relevant State Complaint Recommendations:**

Case No.: 94.514 (out of district placement)

Case No.: 94.508

Case No.: 94.507

Case No.: 94.516

Case No.: 93.516

Case No.: 93.511

Case No.: 93.507

Case No.: 93.505

Case No.: 93.502

Case No.: 93.501

Case No.: 92:505

Case No.: 92:508

Case No.: 91:515

Case No.: 91:513

Case No.: 91:512

Case No.: 91:511

Case No.: 91:505

Case No.: 90:505

Case No.: 89:512

Case No.: 88:508

Case No.: 89:505 (funding)

Case No.: 89:502 (shortened school days and transportation)

Case No.: 88:511

Case No.: 88:510 (transportation)

Case No.: 88:507

Case No.: 88:505 (exclusion)

Case No.: 88:502

VI. RESIDENTAL PLACEMENT

**Relevant State and IHO Due Process Decisions:**

Case No.: L91:114

**Relevant State Complaint Recommendations:**

VII. PRIVATE SCHOOLS

**Relevant State and IHO Due Process Decisions:**

Case No.: L88:101 (unilateral private placement and reimbursement)

Case No.: S88:101 (unilateral private placement and reimbursement)

Case No.: S88:101 (reimbursement)

**Relevant State Complaint Recommendations:**

VIII. LEAST RESTRICTIVE ENVIRONMENT

**Relevant State and IHO Due Process Decisions:**

Case No.: L92:115

Case No.: L92:116

Case No.: L91:114

Case No.: L91:113

Case No.: S91:107

VIII. LEAST RESTRICTIVE ENVIRONMENT (continued)

Case No.: L91:107

Case No.: L89:102

Case No.: S89:102

**Relevant State Complaint Recommendations:**

Case No.: 94.514

Case No.: 94.507

Case No.: 93.504

Case No.: 92:505

Case No.: 91:512

Case No.: 91:511

Case No.: 89:512

Case No.: 89:505

IX. STUDENT EVALUATION

**Relevant State and IHO Due Process Decisions:**

Case No.: L94:119

Case No.: L 93105

Case No.: L92:105

Case No.: S90:101

Case No.: L89:103 (assessment)

Case No.: S89:103

Case No.: L89:102 (evaluation)

Case No.: L89:101 (assessment; independent educational evaluation)

IX. STUDENT EVALUATION (continued)

**Relevant State Complaint Recommendations:**

Case No.: 94.516

Case No.: 93.516

Case No.: 92:505

Case No.: 91:501

Case No.: 90:509

X. CONFIDENTIALITY OF INFORMATION

**Relevant State and IHO Due Process Decisions:**

Case No.: L90:101 (education records)

**Relevant State Complaint Recommendations:**

Case No.: 94.511

XI. RELATED SERVICES

**Relevant State and IHO Due Process Decisions:**

Case No.: S93:110

Case No.: L93:110 (recreation)

Case No.: L92:105 (recreation, sex education)

Case No.: L91:108

Case No.: L90:102 (special olympics)

Case No.: L89:100 (psychological services)

**Relevant State Complaint Recommendations:**

Case No.: 94.518

Case No.: 94.512 (O.T.)

XI. RELATED SERVICES (continued)

Case No.: 94.509

Case No.: 94.505 (counseling, O.T., aids and support)

Case No.:94.503 (transportation)

Case No.: 93.513

Case No.: 93.510

Case No.: 93.507

Case No.: 93.505

Case No.: 92:506

Case No.: 92:508

Case No.: 89:512

Case No.: 89:505

Case No.: 88:510

XII. INDIVIDUAL EDUCATIONAL PLAN

**Relevant State and IHO Due Process Decisions:**

Case No.: L94:121 (compliance with IEP)

Case No.:L94:107

Case No.: L93:105

Case No.: L92:105

Case No.: L91:114

Case No.: L91:113

Case No.: L91:108

Case No.: L90:102 (change of placement and aide services)

XII. INDIVIDUAL EDUCATIONAL PLAN (continued)

Case No.: S90:102 (characteristic of service)

Case No.: L90:101 (short-term objectives)

Case No.: S90:101 (educational benefit and parental involvement)

Case No.: S90:100 (aide services)

Case No.: L89:103

Case No.: S89:103 (short-term instructional objectives)

Case No.: S89:102 (clustering of services)

Case No.: L89:101

Case No.: L88:101

Case No.: L88:100 (current placement)

**Relevant State Complaint Recommendations:**

Case No.: 94.517

Case No.: 94.514

Case No.: 94.508

Case No.: 94.506

Case No.: 94.505

Case No.: 94.504

Case No.: 93.512

Case No.: 93.511

Case No.: 93.507

Case No.: 93.505

Case No.: 93.502

XII. INDIVIDUAL EDUCATIONAL PLAN (continued)

Case No.: 93.501

Case No.: 92:508

Case No.: 91:512

Case No.: 91:511

Case No.: 88:505 (change of placement)

XIII. ATTORNEY FEES

**Relevant State and IHO Due Process Decisions:**

Case No.: L90:102

Case No.: L90:101 and LS90:101

Case No.: S90:101

Case No.: L90:100

Case No.: L89:102

Case No.: S89:102

Case No.: S88:101

**Relevant State Complaint Recommendations:**

XIV. SURROGATE PARENTS - GUARDIAN AD LITEM PROGRAM

**Relevant State and IHO Due Process Decisions:**

**Relevant State Complaint Recommendations:**

XV. HIV AND OTHER HEALTH RELATED ISSUES

**Relevant State and IHO Due Process Decisions:**

**Relevant State Complaint Recommendations:**

Case No.: 88:505 (Hepatitis B)

XVI. QUALIFIED INSTRUCTIONAL PERSONNEL

**Relevant State and IHO Due Process Decisions:**

**Relevant State Complaint Recommendations:**

Case No.: 90:509 (staff training)

Case No.: 89:505 (qualifications and class size)

XVII. INFANTS AND TODDLERS AND OTHER PRESCHOOL HANDICAPPED

**Relevant State and IHO Due Process Decisions:**

**Relevant State Complaint Recommendations:**

Case No.: 94.510

XVIII. GRADUATION AND EXIT

**Relevant State and IHO Due Process Decisions:**

Case No.: S90:101 (compensatory education)

**Relevant State Complaint Recommendations:**

Case No.: 90:101

Case No.: 88:508

XIX. TRANSITIONAL PROGRAMMING

**Relevant State and IHO Due Process Decisions:**

Case No.: L92:115

Case No.: S92:115

**Relevant State Complaint Recommendations:**

Case No.: 94.511

Case No.: 94.508

Case No.: 94.506

## XX. COMPENSATORY SERVICES

**Relevant State and IHO Due Process Decisions:**

Case No.: S93:110

Case No.: L93:110

**Relevant State Complaint Recommendations:**

Case No.: 94.512

Case No. 93.504

**Case Number: L94:107**

**Status:** Impartial Hearing Officer Decision

**Key Topics:** Discipline
Suspension
(IEP) Individual Education Plan (Compliance with IEP)

**Issues:**

- Whether student was denied a Free Appropriate Public Education (FAPE) because District failed to comply with IEP.
- Whether the suspensions violated the stay put provisions and constituted a change of placement.
- Whether the District denied the student FAPE by failing to provide counseling, an independent evaluation, extended school year (ESY), and advisement of rights to parent and student.

**Decision:**

- The District failed to provide FAPE because discipline was not administered pursuant to the IEP and the current IEP is not complete regarding discipline.
- A new IEP must be developed which includes complete appropriate discipline procedures.
- There was no evidence regarding the deficiencies in the IEP other than discipline.

**Discussion:**

- Staffing was not held within two days of suspension as required by the IEP.
- Suspension did not violate stay put provisions.

SEP 09 1994

BEFORE AN IMPARTIAL HEARING OFFICER
STATE OF COLORADO
DUE PROCESS HEARING L94:107

---

IMPARTIAL HEARING OFFICER DECISION

---

In the Matter of the Educational Placement of a Student,

[redacted]

Concerning

LEWIS PALMER SCHOOL DISTRICT #38

and

[redacted]

Parent of the Student.

---

PROCEDURAL HISTORY

[redacted] (hereinafter the "Parent") initiated these proceedings by a letter dated February 4, 1994 requesting a due process hearing regarding the educational placement of her son, [redacted] (hereinafter the "Student") which was received by the Lewis Palmer School District #38 (hereinafter the "District"). A supplemental request letter dated February 17, 1994 was sent to the District by the Parent & Student's attorney. By letter dated February 24, 1994 from the Colorado Department of Education, the undesigned was designated as Impartial Hearing Officer (hereinafter the "IHO").

Through a series of agreements the Parent and the District agreed to extend the time required for a decision until September 5, 1994.

A prehearing conference was conducted by the IHO at the District's offices in Monument, Colorado on April 1, 1994 which was attended by the Parent and Student's attorney and the District's attorney and director of special education.

The District filed a motion to dismiss which was denied by the IHO. The Parent and Student submitted a disclosure statement as did the District.

The Due Process Hearing was conducted by the IHO at the District's office building, 146 Jefferson Street, Monument, Colorado on Tuesday, August 30, 1994. The Student and Parent were present and represented by Dana P. Hlavac, Esq. The District was

present through its special education director, Ms. Linda Williams and was represented by Robert I. Cohn, Esq.

The Parent and Student submitted 9 documents as exhibits and called the following 11 witnesses: Ted L. Belteau, Robert J. Beilstein, Roy Rosenthal, M.D., Steve Rausch, MSW, John White, JoAnn Cool, Diane Burke, PhD, Barbara L. Hughes, Esq., Linda Williams, Ted Bauman, the Parent.

The District submitted 8 documents as exhibits and called no witnesses.

## ISSUES

The following were the issues submitted to the IHO for decision:

1. Was the student denied a free appropriate education (hereinafter "FAPE") because:

   a) The District failed to comply with the March 30, 1994 individualized educational program (hereinafter "IEP").

   b) The District failed to provide an alternative discipline plan.

   c) The District failed to provide psychiatric or psychological counseling as a related service so that the student could benefit from special education.

   d) The District failed to conduct an independent evaluation.

   e) The District failed to provide an extended school year program (hereinafter "ESY").

   f) The District failed to advise the Parent and Student of their rights to an alternative discipline plan and related services; and

   g) The District's suspensions of the Student violated the stay put provisions and constituted a change of placement?

2. Should the Student and Parent be awarded their attorney fees and costs?

Based upon the exhibits and the testimony of the witnesses, the IHO makes the following findings of fact.

## FINDINGS OF FACT

1. The Student is a male, born May 13, 1975 who is a senior attending Lewis Palmer High School within the District.

2. The Student has been determined to be significantly impaired emotionally disabled (SIED). He has been described as being bipolar meaning that at times he is very depressed (lethargic) while at other times he may be manic (hyper, angry, aggressive, volatile). He may also simultaneously exhibit symptoms of being depressed and manic. He has been prescribed medications to control this mood disorder.

3. On March 30, 1993 an IEP was prepared for the Student as a result of a triennial review. On page 5 of that IEP it states in part, "A staffing MUST be held within two school days following a suspension or expulsion to review this individual education plan."

4. The student was suspended from Lewis Palmer High School for 3 days beginning on September 13, 1993 because he possessed a knife with a blade approximately 4 inches long.

5. The next staffing held after the September 13, 1993 suspension was conducted on May 17, 1994.

6. On Friday, February 4, 1994, the Student became involved in a dispute regarding the seating on the school bus which was to transport the Student and others home after school. Mr. Ted L. Belteau, an assistant principal for the District was asked to deal with the dispute. In the course of the discussion between the Student and Mr. Belteau, the Student became very agitated. The Student refused to comply with Mr. Belteau's instructions. The Student directed obscene language toward Mr. Belteau in threatening to kill him and to do serious harm to him.

7. The Student's physician testified that the actions of the Student stated in the preceding paragraph were related to the Student's bipolar mood disorder. The Student's therapist believes that in that incident the Student did a good job in controlling his anger.

8. Mr. Belteau felt very threatened by the Student in that he believed the Student would seriously harm him and his family.

9. Other employees of the District who witnessed this altercation corroborated that Mr. Belteau had reason to feel threatened.

10. On Saturday, February 5, 1994 a letter signed by the principal of Lewis-Palmer High School was delivered to the Parent. The letter was a notice that the Student was suspended from that school for 5 days because of his refusal to follow directions and because of the threats that he made. That letter also gave notice of a staffing to be held on February 14, 1994.

11. Because of scheduling conflicts the staffing scheduled for February 14, 1994 was rescheduled for Friday, February 11, 1994. As the staffing was to convene the Parent requested that the staffing be open to the public including any members of the press who desired to attend. Upon the advice of the District's attorney, the District refused to proceed with the staffing.

12. The District claims that confidential information regarding other students was to be revealed during the staffing.

13. On February 11, 1994, after the incident involving the cancellation of the staffing, the Parent received a letter from the District's Superintendent's Designee extending the Student's suspension 3 days. The Student was allowed to return to school on Thursday, February 17, 1994.

14. On May 17, 1994 a staffing was held to update the Student's IEP. On page 2 of that IEP is the following statement, "Team feels that regular rules are enforced but that disciplinary actions should be modified and include input from special ed. teacher and Parent. Specifics will be outlined & ready beginning of the year - 94/95 school year."

15. As of the day of the hearing the disciplinary modifications noted in the preceding paragraph had not been completed though classes had begun in the District for the 94-95 school year.

16. During March 1993 the District has made the following evaluations of the Student: Speech and Language Evaluation, Kaufman Brief Intelligence Test, Woodcock-Johnson Psycho-Educational Battery and a School Health Staffing Summary.

17. Independent evaluations have been conducted by the following entities: Penrose Hospital, Brockhurst, Cedar Springs, and the Needs Program.

18. During the hearing the Parent testified she did not recall seeing the evaluations noted in paragraphs 16 and 17 and is not familiar with those evaluations though all of the evaluations noted in paragraph 16 and above and the report from the NEEDS Program were disclosed by her attorney as documents that she might introduce during the due process hearing.

19. There was no evidence of any academic reason such as regression for ESY.

20. There was no evidence that psychological or psychiatric counseling was necessary for the Student to benefit from his education.

21. Psychiatric and psychological counseling are available from sources outside the District at no charge to the Student. The District is willing to coordinate with those sources.

22. Except for the February 14, 1994 staffing that was rescheduled and then cancelled, no person or entity requested a staffing after the suspensions until the May 17, 1994 staffing was held.

23. Because of changes in the law, the District ignored the statement on the 3/30/93 IEP form that a staffing was to be held 2 days after a suspension.

24. Prior to the May 17, 1994 staffing the Parent was provided written information that listed the Student's and the Parent's right pursuant to IDEA and its implementing rules, guidelines, etc.

25. No disagreements with the above noted evaluations were stated by the Student or the Parent.

## DISCUSSION

I. Discipline.

During the 1993-94 school year the Student was suspended from school for (3) three days during September of 1993 and for eight (8) days during February of 1994. For both suspensions the Student was receiving services pursuant to the March 30, 1993, IEP which stated that the Student was to be subject to regular District discipline procedures except that a staffing "must" be held within two school days following a suspension to review the IEP. No such staffing was held for this Student after his two suspensions.

No staffing was attempted for the September 1993 suspension. A staffing was convened after the February 1994 suspension but was immediately terminated because of the Parent's request that it be open to the public.

The District maintains that the staffing requirement was not followed because of changes in the law. The District is of the opinion that certain legal decisions made after the writing of the 1993 IEP removed from the District the obligation to provide staffings soon after suspensions. Because the District did not believe it had a legal obligation to conduct the staffings it chose not to do so.

The IHO is of the opinion that the District can provide the Student more than the minimum required by law. Even if the staffings were not mandated by other law, the IHO believes they were part of the Student's IEP and if the District wished to avoid that requirement it should have initiated a staffing prior to the September 1993 suspension to seek a discipline plan without that requirement.

The District's conduct belies its position that it did not believe staffings to be necessary after a suspension in that it ignored the requirement in September of 1993 but in February of

1994 it sought to comply with that requirement.

The District's own policy for the discipline of special education students states in part, "Appropriate discipline for special education students shall be determined by the student's individual education plan (IEP)". That policy seems to dovetail with the design of the law that the Student's educational program be set forth in the IEP. Individuals with Disabilities Education Act (hereinafter "IDEA"), 20 U.S.C. Sections 1400 et seq. and the State Plan of the Colorado Department of Education (hereinafter "the State Plan"), Fiscal years 1992-94.

Finally the testimony at the hearing was that the discipline portion of the IEP for the current year (1994-95) has not been completed.

Because the discipline of the Student has not been administered pursuant to the IEP and the current IEP is not complete regarding discipline the District has not provided the Student with a "free appropriate public education", (hereinafter "FAPE"), 20 USC Section 1401(18).

II. Other Issues.

The Parent and the Student have challenged the educational program and have asked that it be changed. Therefore, they bear the burden of proof. Johnson v. Independent School District No. 4 of Bixby, 921 F.2d 1022 at 1026 (10th Cir. 1990).

The Parent and the Student have been represented by attorneys licensed to practice law in the State of Colorado beginning February 17, 1994 and continuously thereafter including throughout the hearing.

Despite bearing the burden of proof and being represented by counsel, the Parent and the Student provided little or no evidence regarding the following issues raised in the February 17, 1994 letter supplementing the initial request for hearing and in the disclosure statement dated April 20, 1994.

1. IEP deficiencies other than discipline. There was no compelling evidence regarding the deficiencies in the curriculum and the IEP except for suspensions and requests for related services, independent evaluation and extended school year.

2. Advisement of rights. There was no convincing evidence that the District failed to inform the Parent and the Student of their rights.

3. Related services. There was no evidence except for the suspensions that the Student was not benefitting from his education.

4. Independent evaluation. The Parent testified she was unaware of the evaluations that had been done though most of them were identified prior to hearing by the Parent's attorney as documents to be introduced into evidence. There was no evidence of any disagreement with the evaluations of the Student.

5. ESY. There was no showing of regression or other justification for extended school year services for the Student.

Though the IHO holds that the Parent and Student have not met their burden of proof on these issues (1-5 above), he was not provided enough information at the hearing by any party to form an opinion as to whether these are legitimate problems with the Student's special education. Nevertheless because of the lack of evidence the IHO must leave it to the parties to take further action regarding these issues.

6. Stay put provision. There was no testimony or other evidence presented at the hearing regarding when or how the Parent's letter requesting this due process hearing was delivered to the District. The only information the IHO has on this issue is a copy of that letter which was sent to the IHO by the Colorado Department of Education. On that copy the note is dated February 4, 1994 and is date stamped February 7, 1994. Because there is no evidence on this issue the IHO cannot find a violation of the stay put provisions of the law.

7. Suspensions as a change in placement. The Parent and Student have asked that the IHO rule that because the total of the days suspended during both September and February exceed ten days that the IHO should find that there has been a change of placement without the required notice, staffing, etc. The current interpretation by the Colorado Department of Education is that suspensions of less than 10 days each that are separated by several months do not constitute a change of placement even if the aggregate of the days suspended does exceed ten. The IHO will not attempt to nullify that interpretation in this case because: (a) the aggregate of the suspensions is eleven (11) which only exceeds the limit by one (1) day; (b) the time between the suspensions was approximately five (5) months, and (c) most importantly the IHO has found on other grounds that the District's actions in disciplining this Student were improper.

8. Attorneys fees and costs. The statute states that a court may award attorneys fees and costs. 20 U.S.C.§ 1415(e). Because the IHO is not a court he cannot award attorneys fees and costs.

APPROPRIATE RELIEF

The District's failure to follow the IEP constitutes a denial of FAPE. The IHO does not believe that Congress intended to permit school districts to engage in violations of IDEA with impunity. Unfortunately the Parent and the Student did not provide the IHO with sufficient expert testimony to support an order for

compensatory education, such as the related service of psychiatric counseling or extended school year. Therefore the only remedy available to the IHO is to order the implementation of acceptable discipline procedures for the Student and that the district follow those procedures.

## CONCLUSIONS OF LAW

1. The District did not discipline the Student during the 1993-94 school year pursuant to the IEP because it did not covene a staffing within two days following each suspension.

2. The Parent and the Student did not meet their burden of proof on any other issue raised in the due process hearing.

3. The IHO is without sufficient evidence to construct a remedy for the District's procedural violation other than to order it to complete and observe the IEP for the 1994-95 school year.

4. The IHO does not have authority to award attorneys fees and costs.

## ORDER

This matter is remanded to the District to conduct a new staffing and develop a new IEP including meaningful and appropriate participation by the Parent, Student and their representatives (if any) to complete appropriate discipline procedures and to review and update all other matters contained in the IEP.

The District shall comply with all its responsibilities as delineated in the IEP.

The staffing shall take place within 15 days.

## NOTICE OF APPEAL RIGHTS

A copy of the rules regarding state level review is attached and incorporated by this reference.

Dated this 6th day of September, 1994.

By:

Gordon F. Esplin
Impartial Hearing Officer

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing IMPARTIAL HEARING OFFICER DECISION was deposited in the United States mail, postage prepaid, on this 7th day of September, 1994, addressed as follows:

**Certified mail to:**

[redacted]

Mr. Dana P. Hlavac, Esq.
Vahsholtz & Hlavac, L.L.C.
14 West Costilla
Colorado Springs, CO 80903

**Certified mail to:**
Mr. Robert I. Cohn, Esq.
Stettner, Miller & Cohn, P.C.
1380 Lawrence Street
Suite 1000
Denver, CO 80204-2058

Dr. Fred Smokoski
Colorado Department of Education
201 East Colfax Avenue
Denver, CO 80203-1704

Peggy A. Ganske
Peggy A. Ganske

hearing officer is final and binding upon the parties.

6.03 (7) Registry of due process hearing officers.

The Department of Education, Special Education Services Unit, shall keep a list of persons trained by the Department who may serve as due process hearing officers. The list must include a statement of the qualifications of each of these persons. Parties to a hearing shall select hearing officers from this list. A person who otherwise qualifies as a hearing officer is not an employee of a public agency solely because that hearing officer is paid by the agency to conduct a hearing.

6.03 (8) Individuals described by the following criteria shall not be eligible as hearing officers:

6.03 (8) (a) Officers and employees of the State Board of Education.

6.03 (8) (b) Officers and employees of school districts and administrative units.

6.03 (8) (c) Any person having a personal or professional interest, including persons involved with the care of the child, which would conflict with his or her objectivity in a hearing.

6.03 (8) (d) Parents of children with disabilities from birth to 21.

6.03 (9) Right to appeal decision of impartial hearing officer.

Either party may obtain state level review of the decision of the impartial hearing officer. The state level review shall be conducted by an administrative law judge of the Colorado Department of Administration, Division of Administrative Hearings.

6.03 (10) Procedure for appealing decision of impartial hearing officer.

6.03 (10) (a) Any party who seeks to appeal the decision of an impartial hearing officer shall file with or mail to the Division of Administrative Hearings within 30 days after receipt of the impartial hearing officer's decision:

6.03 (10) (a) (i) A notice of appeal.

6.03 (10) (a) (ii) A designation of the transcript. A party may designate a portion of the tape recorded record or arrange for a transcript of the tape recorded record.

6.03 (10) (b) Simultaneously with mailing or filing the notice of appeal and designation of transcript with the Division of Administrative Hearings, the appealing party shall mail copies of these documents to the Department of Education and to all other parties in the proceeding before the impartial hearing officer at their last known addresses.

Within five days of receipt of a notice of appeal, any other party may file a cross appeal.

6.03 (10) (c) The notice of appeal shall contain the following:

6.03 (10) (c) (i) The caption of the case, including case number and names of all parties.

6.03 (10) (c) (ii) The party or parties initiating the appeal.

6.03 (10) (c) (iii) A brief description of the nature of the case and the order being appealed.

6.03 (10) (c) (iv) A list of the issues to be raised on appeal.

6.03 (10) (c) (v) A copy of the findings of fact and decision of the impartial hearing officer being appealed.

6.03 (10) (c) (vi) A certificate of service showing the date the copy of the notice of appeal was mailed to the Department of Education and to all parties in the proceeding before the impartial hearing officer. All subsequent documents and pleadings filed with the Division of Administrative Hearings shall similarly contain a certificate of service showing that a copy was mailed to all parties.

6.03 (10) (d) A notice of cross appeal shall contain those items listed in 6.03 (10) (c) (i-iv) above along with a certificate of service.

6.03 (10) (e) At the time the notice of appeal is filed or mailed, the appealing party shall also file with or mail to the Division of Administrative Hearings either a statement that no transcript is necessary for the appeal and a review of the tape recorded record is sufficient or a designation of all portions of the transcript necessary for resolution of the appeal. No transcript is required if the issues on appeal are limited to pure questions of law.

6.03 (10) (f) Within five days after the receipt of the notice of appeal and designation of transcript or tape recording, the other party may file with the Division of Administrative Hearings a designation of any additional portions of the transcript which the party believes are necessary for resolution of the appeal.

6.03 (10) (g) Whichever party appeals the decision shall insure that such transcript is filed with the Division of Administrative Hearings within 15 days of the date the notice of appeal is mailed or filed.

6.03 (10) (g) (i) Whichever party appeals the decision shall, simultaneously with filing or mailing the notice of appeal and designation of record, contact

the court reporter and order the transcript or arrange for the transcription of a tape recorded record or submit the entire tape recorded record.

6.03 (10) (g) (ii) Immediately upon filing any additional designations pursuant to Section 6.03 (10) (f) of these Rules, any party submitting designations shall order from the court reporter the transcript or arrange for transcription in the case of a tape recorded record and shall insure that such transcript is filed with the Division of Administrative Hearings within 15 days, or submit the entire tape recording.

6.03 (10) (g) (iii) A party requesting a written transcript is responsible for paying for it. A party requesting parts of a written transcript by filing an additional designation is responsible to pay for those portions of the transcript. Parent(s) shall not be required to pay for the cost of a copy of the tape recorded record for an appeal. The transcript or portions thereof shall be made available to any party at reasonable times for inspection or copying at the copier's expense.

6.03 (10) (h) Upon receipt of the notice of appeal, the administrative law judge assigned to hear the appeal shall direct the impartial hearing officer to certify and transmit to the administrative law judge, within seven days, all pleadings and documents filed with the impartial hearing officer, all exhibits and the decision of the impartial hearing officer.

6.03 (11) State level review procedures.

6.03 (11) (a) Unless otherwise ordered by the administrative law judge, briefs shall be filed and oral argument held within 20 days after the filing or mailing of the notice of appeal.

6.03 (11) (b) In conducting a state level review, the administrative law judge shall:

6.03 (11) (b) (i) Examine the transcript and certified record received from the impartial hearing officer.

6.03 (11) (b) (ii) Seek or accept additional evidence, if needed.

6.03 (11) (b) (iii) Afford the parties an opportunity for oral or written argument, or both, if appropriate, at a time and place reasonably convenient to the parties.

6.03 (11) (b) (iv) Determine and assure that the procedure at the hearing before the impartial hearing officer was in accordance with the requirements of due process.

6.03 (11) (b) (v) Make a final and independent decision and mail such to all parties within 30 days of the filing or mailing of the notice of appeal.

6.03 (11) (c) The administrative law judge may grant specific extensions of any of the timelines once a timely appeal has been received.

6.03 (11) (d) In connection with the state level review, the parties shall have the following rights:

6.03 (11) (d) (i) To be accompanied and advised by counsel and by individuals with special knowledge with respect to the problems of children with disabilities.

6.03 (11) (d) (ii) If further evidence is to be taken, to present evidence and confront, cross-examine, and compel the attendance of witnesses.

6.03 (11) (d) (iii) To prohibit the introduction of any evidence through witnesses or documents at the hearing if the witness has not been identified or the document has not been disclosed to that party at least five days before the hearing.

6.03 (11) (d) (iv) To obtain a written or electronic verbatim record of the hearing.

6.03 (11) (d) (v) To obtain a written determination upon state level review, including written findings of fact and a decision.

6.03 (12) The decision made upon a state level review shall be final except that either party has the right to bring civil action in an appropriate court of law, either federal or state.

6.03 (13) Attorneys' fees.

In any administrative proceeding brought under C.R.S. 22-20-101, et. seq., the impartial hearing officer or the administrative law judge may not award reasonable attorneys' fees as part of the cost to the parent(s) or guardian of a child with disabilities who is the prevailing party.

**Case Number: L94:119**

**Status:** Impartial Hearing Officer Decision

**Key Topics:** Discipline (expulsion, behavior related to attention deficit disorder)
Student Evaluation
Procedural Safeguards (Advisement of Rights)

**Issues:**

- Whether incidents which led to the expulsion were a manifestation of the student's disability.
- Whether the student is eligible for services under IDEA.
- Whether assessments were completed and evaluated properly and when requested.
- Whether the District maintained accurate and complete records.

**Decision:**

- Conduct resulting in expulsion is not a manifestation of disability.
- Student is not eligible for services under IDEA, but is eligible under Section 504.
- Student should continue taking medication for ADD and complete homework assignments.
- District must reconvene student's staffing team every semester.
- Due process claims regarding record-keeping, parental rights notices and assessment and evaluation were dismissed.

**Discussion:**

- Behaviors resulting from ADD.
- Use of test scores to determine student's functional level.

DEPARTMENT OF EDUCATION, SPECIAL EDUCATION, STATE OF COLORADO

Case No. L94:119

---

DECISION OF THE HEARING OFFICER

---

## I. INTRODUCTION

The hearing in this matter was held October 3-4, 1994, at the El Paso County Office Building, 27 E. Vermijo, Colorado Springs, Colorado. Jurisdiction was conferred by P.L. 94-142 (20 U.S.C. Sec. 1415); 34 C.F.R. Sec. 300 et seq.; and part VII of the current Colorado State Plan (FY 1992-94). Petitioner was represented by Newman McAllister, Esq., Attorney at Law, and Respondent School District ("the District") was represented by Robert J. Cohn, Esq., of Stettner, Miller and Cohn, P.C. The hearing was closed to the public; the Petitioner attended briefly, to give testimony.

The hearing was convened pursuant to a complaint filed by Petitioner, through his counsel, with the Colorado Department of Education on June 24, 1994, amendment to which was permitted by the hearing officer on July 15 and August 11, 1994. As amended, the complaint states that the District has violated the procedural and substantive provisions of the Individuals with Disabilities Act (42 U.S.C. Sec. 1400, et seq.) and Section 504 of the Rehabilitation Act (29 U.S.C. 794), by failing to provide Petitioner with a free appropriate public education, as follows:

i) by expelling Petitioner from R. High School on May 19, 1994, without consideration of or determination that the conduct which caused the expulsion was a manifestation of his disability;

ii) by failing to assess and identify Petitioner as a youth with a disability and failing to provide him with special education beginning in 1991;

iii) by failing to inform Petitioner of his due process rights as a result of the District's failure and refusal to assess and identify Petitioner as a youth with a disability, or to provide him with special education services beginning in 1991;

iv) by failing to maintain and retain accurate and complete records of Petitioner's previous requests to be assessed and identified as a youth with a disability;

v) by improperly assessing and interpreting test results at the staffing of August 2, 1994;

vi) by refusing, on August 2, 1994, to identify Petitioner as a youth with a disability, failing to recommend and provide special education services, and failing to recommend and provide any special education services until the beginning of the second semester of the 1994-95 academic year.

## III. GENERAL MATTERS

1. Prior to the hearing, upon the consent of both parties, the 45-day timeline within which the present decision would otherwise have been required to be rendered and mailed to the parties was extended, through October 17, 1994. Authority for such extension, on the request of either party, is found in the Colorado State Plan, FY 1992-94, Part II, Sec. (B), Subsec. (VII)(B)(4)(b)(1), at p. 33. The hearing officer obtained the consent of both parties to extend the deadline yet another day, and so mailed the decision October 18.

2. Also prior to the hearing, pursuant to the hearing officer's order of July 19, 1994, the school district convened a multidisciplinary team on August 2, 1994, to assess Petitioner for his eligibility for special education. The team prepared a Section 504 plan as a result of this meeting, but concluded that Petitioner was ineligible for special education services. The materials relating to this assessment, as well as the screening which preceded it, are in evidence as Exhibits K through Z.

3. The witnesses who testified in this matter for Petitioner were: the Petitioner's father and mother; Patricia Pirrello, who was qualified as an expert in clinical psychology; Charlotte Tye, who was qualified as an expert in "educational therapy," which was defined to mean work with children with learning disabilities; and Pamela K. Murray, who was qualified as an expert in attention deficit disorder.

4. Respondent's witnesses were Nancy Billiard, Petitioner's 8th grade math and science teacher in middle school; Mary Padgett, the principal at R. High School; Diana Saunders, an assistant principal at R. High School; Gail M. Viveiros, the coordinator of behavioral programs with the District, who was qualified as an expert in interpreting the tests that were given to Petitioner; and E. Roger Williams, the District's psychologist, who was qualified as an expert in psychology.

5. Petitioner's exhibits are labeled with numbers, and Respondent's with letters of the alphabet. Exhibits admitted into evidence were:

For Petitioner: Exhibits 1-31
For Respondent: Exhibits A through JJ

One unlabeled exhibit, an audiology report, was ex-

changed, and for the first time endorsed, by Petitioner on September 29, 1994. Respondent objected, since the "five-day cut-off" for exchange of exhibits was September 27, 1994. Petitioner did not desire a continuance, and this exhibit was consequently excluded.

6. A list of objections, and the rulings thereon, has not been prepared to accompany this decision, since the proceedings were reported stenographically and a transcript made available within two days of the hearing's conclusion.

## IV. FINDINGS OF FACT

Educational and Diagnostic Background.

1. Petitioner is presently 17 years old, and living with his parents at the Air Force Academy in Colorado; he also has an older sister who now has left home to attend college. His father is in the military, and the family moved several times while Petitioner was growing up. Petitioner's expulsion from R. High School on May 19, 1994, is the primary basis of the present complaint; the events precipitating the expulsion occurred April 27, 1994, in the middle of the second semester of Petitioner's junior year. The family moved in the late summer of 1994, so that Petitioner will attend a different high school when he returns to school, still within Respondent's school district.

2. Petitioner has "ADHD," or "attention deficit hyperactivity disorder." He was first diagnosed with this condition as a second-grader in Texas, in 1984. Exhibit 17, a letter from Petitioner's second-grade teacher notifying his parents that he had been reprimanded in class that day, described his conduct as follows:

> ... disturbing others, talking, not staying on task during work time, up much of the time, tipping over numerous times in his chair, crawling in and out of the trash can in math, not following directions in general all day. He has been sent out twice for disturbing others--a very noisy and wiggly day!

Petitioner's father testified that Petitioner "disliked school from the very beginning."

3. When the ADHD was diagnosed in second grade, Petitioner was placed upon a medication called "Ritalin." There is some conflict in the testimony as to whether he stopped taking Ritalin in the sixth grade or earlier. Based on Dr. Pirrello's testimony, I find Petitioner stopped taking Ritalin sometime in the fifth grade. He then took no other medication until the spring semester of the eighth grade, in 1991, when "Tofranil" was prescribed. Petitioner remained on Tofranil only through part of the fall of 1991, then took no medication again for approximately the next 2-

1/2 years. On July 8, 1994, a third type of medication, Wellbutrin, was prescribed for Petitioner, and he was on that medication at the time of the hearing.

4. A report by Patricia Hayes, M.A., on letterhead which indicates she was a licensed psychologist in Fort Worth, Texas, states Petitioner's IQ to be 120, in the superior range. The report states that the IQ was evaluated via a battery of tests administered in November 1984. Although the protocols for these tests had "been tossed" a long time ago, both parties relied on this report for its other observations, as well as its ultimate diagnosis of ADHD. I find that the report is similarly reliable as to the 1984 measurement of IQ stated therein.

5. The 1984 measurement of IQ is supported by other testing done by the school Petitioner attended at that time. Exhibit 18 shows that, in March 1985, in the latter half of second grade, Petitioner scored above average, even well above average, in the areas of phonic analysis, reading vocabulary, reading comprehension, spelling, language mechanics, math computation, math concepts and application, and total math. His test scores in the eighth month of the third grade, in La Mesa, California, show "mastery" of every subject except "[subtracting] decimals or fractions," and his report cards from the third and fourth grades similarly are very good. Petitioner made "A's" in all the academic subjects in these years, his only below average grade being in handwriting.

6. Petitioner's test scores towards the end of the fifth grade (April 1988) have dropped considerably, but are still above average. At the beginning of the sixth grade, the scores become simply average, and many subject areas now show "non-mastery." The score for "total battery" dropped from the 87th percentile in the second grade (on the California Achievement Tests) to the 50th percentile at the end of the sixth grade (on the Comprehensive Test of Basic Skills). Petitioner attended school in Germany for fifth, sixth, and seventh grades.

7. In April 1991, in the eighth grade, Petitioner's composite score on the Iowa Tests was 31, which was characterized in the test printout as performance approximately a year below grade level, or "somewhat below average for his grade." Scores on the PSAT, ACT, and SAT tests taken by Petitioner in 10th and 11th grades fall well below average; however, because the comparison group for those tests has changed (to college-bound students, from the general population of students), I have not given weight to these three tests in the present analysis.

8. Report cards for 8th through the first semester of 11th grades are in evidence, and show primarily "C's" and "D's" in academic subjects. In those years, Petitioner received semester grades of "F" in the following courses: German in the 8th grade; the first semester of English I and both semesters of Algebra I in

the 9th grade; the second semester of Algebra I and World History/ Geography in the 10th grade; and the first semester of U.S. History in the 11th grade.

9. When measured on August 2, 1994, by psychologist Patricia Pirrello, Petitioner's IQ was 93, in the average range. Petitioner's IQ has therefore declined since the second grade, reflecting an inability to take as full advantage of his education during these years as might have been expected from his original score. Since the decline to average or somewhat below-average achievement occurred in the sixth grade--two years before Petitioner matriculated in the District--and those scores have remained relatively constant, at an average level, since then, I find the District is not responsible for the decline in Petitioner's IQ.

10. In high school, Petitioner has had not only unremarkable grades, but a substantial number of truancies, tardies, and disciplinary notices. The notices repeatedly cite him for such things as leaving class without permission; talking excessively in class; getting up to sharpen pencils during class discussions; hanging from the basketball hoop; making inappropriate outbursts; and being unable to remain seated or follow instructions.

11. Such behaviors are "textbook" indicators of ADHD. Exhibit 20, excerpts from a book entitled Attention Deficit Disorders: A Handbook for Colorado Educators ("the Handbook," henceforth), issued in Spring 1994 by the Special Education Services Unit of the Colorado Department of Education, describes exactly these types of indicators, including squirming and fidgeting; having difficulty remaining seated; talking excessively; and having difficulty sustaining attention over time. Pages from an unidentified treatise attached at the back of Exhibit 26 list similar diagnostic criteria.

12. Many reported incidents resulting in discipline to Petitioner during high school do not fit within the ADD/ADHD model established by the Handbook, however, and are not explained either by an inability to concentrate or impulsivity. In high school, they included such things as Petitioner's arguing with the teacher; "trashing the room" when a substitute teacher was in; punching an opponent during soccer play; and throwing grapes around the classroom.

13. They also include incidents with sexual overtones. Petitioner was disciplined for unbuttoning his pants, and sitting with them unbuttoned in class; offering to strip for a girl on her birthday; and using "unacceptable language" on a quiz and during P.E. class. He was cited for exposing his buttocks during basketball drills. Other incidents, not referred for discipline at the time but reported in the wake of the April 27 incident, include Petitioner's pulling his pants down in front of girls in his art photography class, crawling on the darkroom floor grabbing their

legs, and attempting to photograph their "private areas" saying, "Spread your legs." One girl had asked that she not be required to be in the darkroom when Petitioner was there, because of his sexual comments and behavior.

14. The incident on April 27, 1994, similarly occurred in art photography class. While a female classmate was bending down to pour a chemical located on a shelf under the sink, Petitioner undid his pants and pulled out his penis, a foot or two from her face. He subsequently bragged about what he had done to his friends, and told his father he had been emulating rock star Jim Morrison. Petitioner was suspended during the investigation of this incident, and then expelled by action of the school board on May 19, 1994, until January 4, 1995. By the time of the hearing, he had also pled guilty to a criminal charge based on this incident and been sentenced to a juvenile diversion program.

Prior Behavioral Management Strategies.

15. From 1991, when Petitioner first enrolled in the District for 8th grade in the middle school, to the time of the expulsion in his junior year, several of his teachers and counselors worked with him on improving his behavior. He entered into a behavioral contract with his 8th grade teaching team, Ex. 21, which provided for several possible consequences for his continuing "noted behaviors." These consequences ranged from a verbal warning to "time outs," at-home suspension, and parent-teacher meetings.

16. Petitioner's 11th grade Leisure/Sports teacher, Mary Aspenson, along with Assistant Principal Diana Saunders, entered into a similar contract with Petitioner, Ex. 30. Consequences for violation included a warning, a one-minute break, and a time-out in Ms. Saunders's office. Petitioner's 11th grade teacher for English III, Bradley Campbell, again with Ms. Saunders, arrived at yet another contract with Petitioner, Ex. 31, violation of which would result in Petitioner's being dropped from class.

17. Diana Saunders was responsible for Petitioner's discipline in both 10th and 11th grades. She testified that she handled ten "referrals" from Petitioner's teachers during the 11th grade, using a system of progressive discipline which ranged from requiring him to spend time with her in her office during the day, to after-school detentions. Because disciplinary records are expunged at the end of every school year, there is no information as to the number of referrals in earlier grades. Ms. Saunders testified that Petitioner always accepted the consequences of the discipline, and "responded positively" to it. The most serious consequence she dealt Petitioner prior to the April 27 incident was a one-hour in-school suspension.

18. Petitioner's father testified that the parents also usually provided "severe consequences" at home for such conduct.

This was typically grounding. The father believed that Petitioner had intercepted some of the disciplinary notices, which were sent by the school through the mail, however, since the parents had not previously seen some of the ones included as exhibits.

19. According to Dr. Pirrello, such consequences as have been imposed on Petitioner in the past are not perceived by him to be negative. Petitioner has assumed the role of "class clown," and the detentions and suspensions positively reinforce that behavior. Petitioner's 8th grade teacher, Nancy Billiard, characterized the behaviors she intended to target with her behavior contract as "attention-getting" behaviors.

20. In contrast to his behavior at school, Petitioner's behavior in the employment setting has been exemplary. He is good with customers, has received praise from his employers, and was promoted recently. He has not pulled his pants down or been unable to stay on task in these settings, which have included a Wendy's hamburger store; a Montessori school he painted; Orange Julius; "F.R. Riley-Chicken Wings;" and the home of a "nice old lady," where he does odd jobs. Petitioner writes poetry, and has had some of his poems published; and he recently passed his driver's license examination. So far, he has a clean driving record, evidencing the ability to operate a motor vehicle safely.

Circumscribing the Disability.

21. It is against the foregoing backdrop that the conduct of April 27 is evaluated. Dr. Pirrello testified that the incident resulted from Petitioner's poor impulse control, and that "impulsivity" is typical of ADD/ADHD subjects. Yet the uncontrollable, inappropriate type of outburst that "lack of impulse control" connotes to the hearing officer, in the neurological sense, was not what occurred here. This was not an isolated act, but part of a pattern of similar acts. And it was intentional: a plan was involved, as was the execution of several steps to carry it out. Although Petitioner might be deemed not to have considered the consequences of his conduct before he acted, which might suggest impulsivity, the indications are stronger that he simply had no respect for the consequences.

22. The ADD Handbook, praised by both parties and two opposing expert witnesses as being an excellent resource on the subject, does not set forth any symptoms of ADD/ADHD which resemble the conduct at issue here. The same is true of the "diagnostic criteria" from the unnamed treatise, pages of which are included in Exhibit 26. The discussion on these pages indicates that even oppositional behavior (resistance to work or school tasks because of an unwillingness to conform to others' demands) "must be differentiated from the avoidance of school tasks seen in individuals with [ADHD]."

23. It would similarly do a disservice to the usefulness of "attention deficit disorder," as a scientific term describing a specific condition, if it were expanded to cover any and all types of aberrant conduct. Thus, while ADHD might explain Petitioner's inability to stay on task, it does not explain the intimidating behavior deliberately engaged in. I find that the conduct which led to Petitioner's expulsion was not a manifestation of his disability.

24. The records and testimony indicate that Petitioner has no emotional disability. Indeed, his social skills, unlike those of many other ADD/ADHD students, are strong: he is friendly and outgoing. I find that he also does not have any learning disability "co-existing" with the ADHD. Physically, Petitioner is strong and well developed. He frequently makes "A's" in physical education.

25. The level of impairment Petitioner suffers from ADHD was described by Dr. Pirrello as moderate. Petitioner's achievement test scores are in the average range, as administered by both Dr. Pirrello and the multidisciplinary assessment team on August 2. These scores therefore comport with Petitioner's measured IQ of 93. I find that his grades are lower than expected for a person with average IQ, however.

26. Petitioner was on Wellbutrin during Dr. Pirrello's administration of intelligence tests, as well as his driver's license examination. Petitioner describes the Wellbutrin, which he has been taking since early July, as helping him to concentrate. The finding is similarly inescapable that during those years when Petitioner was on Ritalin, both his grades and test scores were substantially better than they were when he was not taking medication. Also, it appears that at least one other doctor besides Patricia Hayes, Dr. Peteroy in February 1991, has prescribed Ritalin for Petitioner, although for unexplained reasons only a summary of his report is in evidence. See Exhibit 16 (both pages). Petitioner's parents, and Petitioner himself, do not believe in taking drugs to control behavior, however, and have not persevered with medication regimens when prescribed.

27. The ADD Handbook states that, for moderately impacted students:

> [I]nstructional strategies and outcomes [must] be adjusted to meet individual needs. For instance, a student with moderate needs may require a specifically tailored behavior management plan. Classroom and homework assignments may need to be altered specifically for the student and the student's performance may need to be carefully monitored. Individual assignment sheets and checklists may be required and frequent communication with the family is often important.

Students who are impacted to a moderate degree often also need instruction in social skills and learning strategies such as study and organization techniques. These may be beyond what is typically necessary for the student's peers.

When students experience moderate impact from ADD, classroom teachers may need support. Educators with specific expertise in the social/emotional and learning areas may need to help design appropriate accommodations. Administrators need to help develop and formalize plans to insure consistency and accountability throughout the building. The schools' response must be more intentional, more intense, and more individualized.

28. The types of strategies discussed in the Handbook, as set forth above, are similar to those Dr. Pirrello recommended in her report for improving Petitioner's performance in school. Gail Viveiros, behavioral programs coordinator for the District, testified that Dr. Pirrello's recommendations can be implemented within regular education. Any student, regardless of handicap or problems, is eligible to have his or her curriculum modified, to take tests in a quiet place, and so forth.

29. Petitioner's poor grades in my opinion do put him "near the edge" in terms of achieving commensurately with his potential. However, the D's and F's could result from other causes than ADHD, such as lack of interest in his courses or conflicts with teachers. Moreover, the low level of performance indicated by the grades is not matched by his achievement tests, which are uniformly in the average range. Based on the foregoing analysis, as well as the testimony of Dr. Roger Williams, therefore, the standardized tests, and not the grades, will be the determinant here of whether there is significant discrepancy between Petitioner's IQ and his level of academic achievement. Examining those scores against Petitioner's present IQ, I find no significant discrepancy.

30. I further find that regular education, as modified in accordance with such measures as have been recommended by Dr. Pirrello, is able to meet Petitioner's needs, as specified in his IEP and Section 504 plan (Exhibit X). Because Petitioner's level of disability is not so severe that he cannot benefit from regular education, I find he does not presently qualify for special education and did not qualify on May 19, 1994.

Eligibility for Special Education in 1991.

31. Petitioner's parents authenticated a letter admitted as Exhibit 2 entitled "Letter of Documentation," which is typewritten and unsigned. It bears handwriting at the top which states "Your draft" and "Feb. 19, 1991." In this letter, directed "to whom it may concern," the parents requested a team change for their son, and also help from the special education department. They speci-

fically requested testing for learning disabilities, in this letter. The mother also testified to personal contacts she had in 1991 with certain special education people in the department or at the middle school.

32. Although Exhibit 2, lacking as it does a signature and evidence of mailing or delivery, would have dubious reliability on its own, Exhibits 3 and 5, letters addressed to the parents from two officials of the District, on District letterhead, discuss their letter dated February 19, 1991. Exhibit 5 specifically apologizes for the parents' "problems ... with the special education department." None of the referenced letters were contained in the District's files on Petitioner, nor do any of the members of the current special education department recall having contact with the parents.

33. In addition to the letters, the team change which was actually implemented for Petitioner in the spring of 1991, as well as the screening which was in fact held by Petitioner's new team in March 1991, lend credence to Petitioner's claims that his parents sought an assessment to determine special education eligibility at that time. The screening worksheet also indicates regular, ongoing contacts between the parents and Nancy Billiard, reflecting a heightened involvement by the District with Petitioner. More important, the screening worksheet indicates that the parents were informed of the results of the screening; and, after 1991, it appears they abandoned their quest for special education. I find that the parents not only sought, therefore, but were informed of and acquiesced in, the results of the screening for special education in the spring of 1991. However, there is no evidence they received notification of their due process rights.

34. As previously noted, in April 1991, on the Iowa Test of Basic Skills, which he took towards the end of the eighth grade, Petitioner's composite test score was 31. The grade level at which he functioned was ascertained to be "77," meaning seventh month of the seventh grade, approximately one year below where he should have been.

35. As to the functioning of the approximately 200 students referred to Gail Viveiros for special education assessments within the district each year, that witness testified:

> [W]hen I get a call, the students are usually very severe. They may have pages of discipline referrals. ... [T]heir achievement scores may be <u>five or six years below grade level</u>, long histories of behavior and academic difficulties, some pretty severe behaviors.

(Emphasis added.)

36. Given the foregoing, as well as the 8th grade team's screening worksheet, which contained Petitioner's 7th grade test scores (50% and 83% in reading comprehension, and 71% in math) and concluded that referral to special education was not appropriate (Exhibit 4), I find that Petitioner's functioning in April 1991 at a level approximately one year below his grade level pursuant to the ITBS still did not constitute a significant discrepancy between his IQ and actual achievement.

## IV. CONCLUSIONS OF LAW

37. The preceding introduction, general matters, and findings of fact are incorporated herein by reference.

The IDEA Claims.

38. The Individuals with Disabilities Education Act, at 20 U.S.C. Sec. 1401(a)(1), defines "children with disabilities" as follows:

> [C]hildren--
>
> (A) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
>
> (B) who, by reason thereof, need special education and related services.

(Emphasis added.) Because Petitioner's needs have not been shown to include special education and related services, Petitioner is not covered by the procedural protections of IDEA, other than that which grants the right to challenge the ineligibility determination itself. See Hacienda La Puente School Dist. v. Honig, 976 F.2d 487 (9th Cir. 1992).

39. Petitioner has not met his burden, by a preponderance of the evidence, to show that his disability constitutes such a disabling physical condition that he is prevented from receiving reasonable benefit from regular education, as contemplated by C.C.R. 2220-R-2.02(1)(a). See also Johnson v. Indep. School Dist. No. 4 of Bixby, Oklahoma, 921 F.2d 1022 (10th Cir. 1990), holding that the party attacking the student's placement bears the burden of proof.

40. Petitioner has not met his burden of proof that the acts which led to his expulsion were a manifestation of his disability within the meaning of § 22-33-106(1)(c), C.R.S. (1994).

The Section 504 Claim.

41. At the prehearing conference held in this matter on September 2, 1994, the parties stipulated as follows:

> [redacted] is disabled, and was disabled at all times mentioned in Petitioner's claims, under Section 504 of the Rehabilitation Act; and [redacted] is entitled to reasonable accommodation pursuant to that Act.

Prehearing Order (9-6-94), par. 1(c). Given this stipulation, and to the extent I have jurisdiction, I hold that the Section 504 claim is moot.

The Claim of Failure to Assess Petitioner in 1991.

42. It has earlier been found that the parents requested the District to conduct an assessment for special education eligibility in 1991, and received one. While it is probable that the District failed to follow its own policies respecting such a screening, only its policies as they existed in 1992 are in evidence (Exhibit 28; see especially Sec. III (B), at 22.). The District did apparently fail to notify the parents of their due process rights in writing. However, in light of the close contacts between the District and the parents in the spring of 1991, I hold that it substantially fulfilled its notice obligations nonetheless. Compare Livingston v. DeSoto County School Dist., 782 F.Supp. 1173 (N.D. Miss. 1992). Petitioner's renewal of his claim for a special education assessment now, precipitated by the expulsion after three years' acquiescence in the status quo, is barred by laches.

The Claim of Improper Assessment and Interpretation of Test Results on Aug. 2, 1994.

43. I find no facts in evidence to support this claim, and note that the presumption is to the contrary: that the testing was done regularly and with adherence to professional standards. I conclude that Petitioner was properly assessed and the test results properly interpreted on this date.

## V. DECISION AND ORDER

44. Because the conduct resulting in Petitioner's expulsion has been found not to be a manifestation of his disability, the District's order of expulsion to January 4, 1995, will not be disturbed.

45. Although I do not have jurisdiction to enforce the provisions of Sec. 504, I do assert jurisdiction over the stipulation entered into between the parties. The District is hereby ordered to implement, in good faith, the terms of its Sec. 504 plan, pursuant to its stipulation with Petitioner.

46. In conjunction with the Sec. 504 plan, I make the following orders:

a. So that Petitioner receives maximum benefit from the time remaining to him in high school, he is hereby ordered, once he returns to school: (1) to continue taking Wellbutrin, as prescribed; and (2) timely to complete and turn in all homework assignments. Petitioner's parents are ordered to use their best efforts to assist Petitioner in complying with these obligations. The parents are also encouraged, but not ordered, to provide a tutor for their son and continue in family counseling.

b. Within two weeks of the close of every semester until Petitioner graduates, the District will reconvene the same multidisciplinary team which met August 2, 1994. Upon convening, the team will solicit and consider detailed comments from the teachers in all of Petitioner's academic subjects, evaluate Petitioner's grades, and make such modifications to Petitioner's school environment and curriculum, based on the results of their evaluation, as in their professional opinion may improve his academic performance during the next semester. Health and psychological evaluations (including achievement testing) are not required at these "mini-staffings."

47. Petitioner's failure to comply with the requirements placed upon him by paragraph 46(a) during any semester will relieve the District of the obligations of paragraph 46(b) for that semester.

48. The due process claims, including those based on poor record-keeping, no notice of appeal rights, and improper assessment/interpretation, are dismissed.

## VI. APPEAL RIGHTS

These findings, conclusions, and decision will go the parents, their counsel, the superintendent of Academy School District #20, the School District's counsel, and the Colorado Department of Education. The original has been retained by the hearing officer, pending any appeal of this matter.

If dissatisfied with these findings, conclusions, or decision, either party may request a state level review by filing or mailing a notice of appeal and designation of the transcript with or to the State Division of Administrative Hearings within 30 days after receipt of the hearing officer's decision. At the same time, the appealing party shall mail copies of the decision and designation of transcript to the Colorado Department of Education and to the other party in the proceeding before the hearing officer at his or its last known address. Within five days of receipt of a notice of appeal, any other party may file a cross-appeal.

Since the transcript has already been prepared in this case, upon being directed by the Administrative Law Judge to certify the record on appeal, the hearing officer will transmit the transcript to the Division of Administrative Hearings, along with the pleadings, exhibits, and decision.

The required contents of the notice of appeal, notice of cross-appeal, and designation of transcript are stated in the Impartial Due Process Hearing section of the Colorado State Plan, FY 1992-94, pages IV-14 and -15. An administrative law judge will be appointed to hear the appeal. Any party wishing to appeal this order has the same rights as he or it had for this hearing. Either party may appeal to the court of appropriate jurisdiction if dissatisfied with the final order.

Dated this 26th day of October, 1994, nunc pro tunc October 18, 1994.

BY THE HEARING OFFICER:

Alison Maynard

Alison Maynard
P.O. Box 17904
Denver, CO 80217
tel: (303) 322-2657

**Case Number: L94:121**

**Status:** Impartial Hearing Officer Decision

**Key Topics:** (IEP) Individual Education Plan (Compliance with IEP)

**Issues:**

- Whether student received services in the resource room for the amount of time required on the IEP.

**Decision:**

- District must provide compensatory services because of failure to provide services required on the IEP.

**Discussion:**

- Did absences of resource room teacher and scheduling conflicts at school which did not allow student to attend resource room violate the conditions of the IEP.

I.

INTRODUCTORY STATEMENT

The hearing was held on August 23, 1994 at the Pueblo School District 60's Administration Building, 315 W 11th Street, Pueblo, Colorado. Jurisdiction is conferred by 20 USC § 1415, 30 CFR §300 et. sec., and Part VII of the current Colorado Department of Education State Plan. Melinda Badgley Orendorf of 409 North Main, Suite 413, Pueblo, Colorado 81003, represented petitioners. Jill S. Mattoon of Petersen and Fonda, 650 Thatcher Building, PO Box 35, Pueblo, Colorado 81002-0035, represented the respondent. The State Department of Education received a request for hearing on July 8, 1994. Section VII. B. of the current State Plan provides that a decision must be reached and a copy mailed to the parties not later than 45 days after the receipt of a request for hearing. Section VII. B. 4. b. (1) provides that the impartial hearing officer may grant a specific extension of time beyond the 45 day time line in which to reach a final decision and mail a copy to the parties at the request of either party. Parties submitted a stipulated joint motion for extension of time which the hearing officer granted until September 2, 1994.

II.

ISSUES

The parties identified the following issue at the pretrial conference of August 10, 1994:

> Did the respondent comply with the requirement in petitioner's individualized education program of education services for 2

1/2 hours per week? If not, what is the proper remedy?

III.

FINDINGS OF FACT

The hearing officer makes the following findings of fact based upon the evidence adduced at the hearing:

1. J.L. is an eleven year old girl who completed the fifth grade at Sunset Elementary School in Pueblo, Colorado in June, 1994. During her fourth grade year, she attended Carlile Elementary School in Pueblo, Colorado.

2. On October 13, 1992, while enrolled at Carlile, J.L.'s individualized education program underwent its annual review. The Report of that review (Petitioner's Ex. 1) shows that J.L. maintained her then current handicapping condition, "PC" or Perceptual Communicative Disorders. The Report also maintained her then current service delivery of 2 1/2 hours per week in a resource or collaborative setting. (Id.) A collaborative setting would involve the introduction of teacher for the educationally handicapped into the normal classroom to assist the disabled student. Resource services are delivered by removal of the student from the regular classroom to a resource room for disabled students.

3. In the fall of 1993, J.L. transferred for her fifth grade year to Sunset Elementary School in Pueblo, Colorado. On October 22, 1993, parties convened a staffing for J.L.'s annual review. In attendance were J.L.'s Mother, Sunset's Principal, Henry Gonzales, J.L.'s EH teacher, Harold Rupert, and her regular classroom

teacher, Patricia Muniz. The parties agreed to maintain J.L.'s current service delivery at the same 2 1/2 hours per week in a collaborative or resource setting.

4. Within the first few weeks after the commencement of the 1993/94 school year, J.L. began receiving services on a collaborative or resource basis Monday through Thursday from 2:20 p.m. to 3:00 p.m., or for 160 minutes per week (compared to the 150 minutes required in the IEP). Mr. Rupert provided educational handicapped services for at least one other student who had very similar needs as J.L. simultaneously.

5. Near the end of November 1993, J.L.'s Mother suspected that J.L. was receiving her EH services irregularly and sporadically. Therefore, beginning November 29, 1993, when she picked J.L. up at school each day, she asked her whether she had received EH services that day and whether they were delivered in the regular classroom or in the resource room. According to J.L.'s reports to her Mother, she saw Mr. Rupert only one time during the week beginning November 29, 1993, one time during the week beginning December 6, 1993, and no times during the week beginning December 13, 1993. On December 17, 1993, J.L.'s Mother called Mr. Gonzales and informed him of the lack of EH services compared to those called for in the IEP. According to Gonzales, he then contacted Muniz, Mr. Rupert, and J.L. regarding her complaint shortly thereafter.

6. When school resumed after the winter break, J.L.'s Mother began recording her daughter's reports regarding her receipt of EH

services daily on a calendar. (Petitioner's Exhibit 9). She continued this practice through the end of the school year in early June, 1994.

7. On January 17, 1994, J.L.'s Mother met with Pam Jacobsen, Director of Special Education for the respondent, and advised her of the alleged lack of EH services rendered to her daughter. Jacobsen confirmed that she had a meeting with J.L.'s Mother regarding the issue of the quantities of services being delivered prior to February 9, 1994, and that J.L.'s Mother contacted her three or four more times regarding the issue after that.

8. On January 25, 1994, J.L.'s Mother called Dr. Roman, the Superintendent of the Pueblo School District to express her concerns. The following day, Ms. Jacobsen called J.L.'s Mother back and scheduled a staffing for February 9, 1994, at which her multiple concerns would be addressed.

9. The staffing was held on February 9, 1994, attended by J.L.'s Mother, Principal Gonzales, Ms. Muniz, Mr. Rupert, Ms. Jacobsen, and Wayne Hunter, Special Education Coordinator for respondent. Ms. Jacobsen was the official recorder at the meeting and her Report reflects no specific conversation regarding the alleged lack of EH services for J.L. (Petitioner's Ex. 3). However, J.L.'s Mother's notes of the same meeting reflect some discussion of that topic, regarding whether the District would replace with a substitute teacher Mr. Rupert when he was absent. (Petitioner's Ex. 10, p. 5). The School District's practice in this regard is not to replace special education teachers with

substitutes when they are gone for only a short period.

10. Some time prior to the February 9, 1994 staffing, J.L.'s Mother requested that J.L. receive her EH services exclusively in the resource room. The School District complied with that request and from that point forward, J.L. did not receive her EH services on a collaborative basis.

11. During the 1993/94 school year, at times, J.L. arrived at school early and spent time with a blind friend in the resource room for approximately 10 to 15 minutes prior to the initial bell. However, J.L. did not receive formalized EH services during the early morning hours. The parties never contemplated that such services would be delivered to J.L. prior to regular school hours. The District's designation of the 40 minute period between 2:20 and 3:00 p.m., Monday through Thursday, demonstrates that it intended to deliver J.L.'s 2 1/2 hours of services at that time (the last regular period of the school day) rather than in the early morning hours when J.L. had no regular obligation to attend school.

12. Near the end of April, 1994, J.L.'s Mother again contacted Mr. Gonzales subsequent to an incident in which Ms. Muniz told J.L. not to attend her EH class because of the importance of math review in her regular classroom. At her mother's request, a meeting specifically to discuss the frequency of J.L.'s attendance at EH was convened on May 11, 1994.

13. Mr. Hunter was recorder at this conference the Report of which is Petitioner's Exhibit 4. That report states as follows:

Mr. Gonzales states that according to documentation kept from

April 12 to 27, J.L. attended EH two times (days) with five days of conflict in scheduling. Parents (sic.) documentation suggests an average of 1 1/2 hour (sic.) per week of EH services since December 1993. The IEP indicates 2 1/2 hours per week of P/C services. Many times J.L. has not attended P/C because of reviewing significant concepts in the regular classroom or to complete an assignment which has already begun, and/or to serve as an assistant for Wild Goose Lab. There has also been conflicts in the school schedule which has (sic.) not always allowed J.L. to participate in P/C time.

14. Employees of the School District who testified at the hearing suggested reasons which may have interfered with J.L.'s regular attendance at EH classes including the following:

1. Christmas and spring activities;
2. Teacher/parent conferences during three weeks of the school year, one in the fall, one in the winter, and one in the spring;
3. Absences by Mr. Rupert for which no substitute was hired. (Mr. Rupert was absent eight times during the school year on days other than Fridays).
4. Occasional student assemblies occurring at the end of the school day.
5. Occasions when J.L. was scheduled to assist younger students with their science projects in the "Wild Goose Lab."
6. The demands of the regular classroom curriculum and the discretion of the classroom teacher.

15. The School District officials, including Ms. Muniz and Mr. Rupert, did not keep specific attendance logs showing J.L.'s attendance at EH. However, it was their general impression that J.L. attended EH on a regular basis throughout the school year.

16. Beginning on May 4, 1994, J.L. attended EH classes on a regular basis throughout the remainder of the school year. Furthermore, the School District provided EH services to J.L. on Friday May 13, 1994, and Friday June 3, 1994, which was above and beyond her normal schedule. The District had previously provided EH services to J.L. on one Friday, January 28, 1994.

17. As a result of the staffing of May 11, 1994, the School District offered and provided extended school year (ESY) services to J.L. during the summer of 1994 for a period of five weeks at the rate of three hours per day. J.L. actually availed herself of those services on twelve days of the 22 school days offered during the summer.

18. The purpose of the ESY services was to advance J.L.'s skills rather than merely to prevent her regression. In that respect, the rationale for providing these ESY services was unusual. (Normally, ESY services are offered to limit or eliminate regression of skills). J.L.'s Mother agreed that J.L. made academic progress as the result of the ESY services provided.

19. While J.L. missed approximately 40% of her ESY classes during the summer of 1994, she had a perfect attendance record during the 1993/94 academic year with no absences and no tardies.

20. Ms. Muniz testified she first heard of the petitioner's complaints regarding the number of hours spent on EH services toward the end of the school year, in late April or the first of May. Mr. Rupert testified that he first learned of such complaints approximately one to two weeks prior to the hearing although he was present at the May 11, 1994 staffing. (Petitioner's Ex. 4, p.3).

21. At least one hour per day at the extended school year sessions are spent on one-on-one or small group academic pursuits. The other two hours per day are spent on group academics and other activities, such as group experiences, arts and crafts and field trips.

22. Respondent's Exhibit A shows that after November 29, 1993, the date when J.L.'s Mother started keeping track of the EH services provided J.L., Mr. Rupert was absent on three occasions excluding Fridays, January 4 and 11, and May 3, 1994. Petitioner's records agree that petitioner received no EH services on those three dates.

23. The weeks beginning November 29, 1993, to May 2, 1994, inclusive encompassed 20 weeks during which school was in session in the respondent's school district. That period covers approximately 78 school days, excluding Fridays. For various reasons, J.L. did not receive services on approximately 37 to 38 of those days or, approximately 47% to 48% of the days.

IV.

DISCUSSION AND CONCLUSIONS

The issue in this case, in essence, is whether the petitioner was provided with a free appropriate public education (FAPE), since 20 USC § 1401 (18) (D) defines a FAPE as, in part, an education provided in conformity with his individualized education program under 20 USC § 1414 (a) (5). The question here is whether J.L. received the services required in her IEP.

Petitioners contend they kept accurate records on a day-by-day basis between the end of November 1993 and the conclusion of the school year in June 1994. Petitioner argues that those records are complete with the exception of approximately three or four days in April 1994 when J.L.'s Mother neglected to ask J.L. whether she had been to EH class (April 5, 6, and 7) and on April 18th when

testimony is conflicting on whether J.L. attended EH class because of the educational program, puberty day. J.L.'s Mother further asserts that she repeatedly notified appropriate school officials regarding her concerns about J.L.'s attendance at EH classes beginning on December 17, 1993, and through the remainder of the school year.

The respondent contends that while it did not keep specific records on a day-by-day basis regarding whether J.L. attended her EH class, she was generally in attendance. The District maintains that J.L. attended these classes with another child of similar needs and that no complaints were received from that child or her parents. The respondent asserts that while the IEP provides for 2 1/2 hours of services per week, reasonableness requires flexibility in the application of that IEP provision, allowing for occasional absences.

While the determination is a difficult one, the hearing officer generally credits the petitioner's day-by-day records over the district's more general impressions conveyed by the classroom and EH teachers. J.L. and her Mother kept records on a daily basis, in writing, promptly after each event occurred. Furthermore, J.L.'s Mother put the district on notice of her concerns beginning December 17, 1993. She made contacts with school administrators such as the Principal, the Director of Special Education, and the Superintendent of Schools. It would have been a better practice for her to contact J.L.'s teachers directly. However, her expectation that the school administrators

would communicate with the teachers was not unreasonable.

The hearing officer is somewhat sympathetic with the district's failure to keep attendance records for J.L. when she moved to her EH class within the building, but the district might have been more diligent about keeping such records after it received notice of J.L.'s Mother's concern regarding J.L.'s receipt of the education services provided for in the IEP.

For the above reasons, the hearing officer concludes that during the period between November 29, 1993, and May 3, 1994, the respondent did not comply with J.L.'s IEP. During that period, J.L. missed approximately 45 to 50% of her EH educational experiences as designed by the district. The hearing officer agrees that the district cannot be held to an inflexible standard which would require attendance every day, but the hearing officer also agrees with the essence of Ms. Jacobsen's testimony at the hearing that a 45% to 50% absence rate constitutes a failure to provide the services.

The hearing officer also does not accept the district's argument that J.L.'s presence in the early morning hours before the initial school bell in the resource classroom constituted some sort of compensatory education. Had the parties intended the early morning sessions to be part of her educational services under the IEP, the district would not have provided for 160 minutes of EH services on Monday through Thursday during the final period of the day to fulfill a 150 minute requirement in the IEP.

However, beginning May 4, 1994, the district took action to

assure that J.L. received her daily EH services, and in addition, offered her compensatory services for the time she had missed. Mr. Rupert held EH class with J.L. on two Fridays, May 13 and June 3, 1994. Additionally, at the May 11, 1994 staffing, the district offered and petitioner accepted extended school year services for five weeks for three hours per day. J.L.'s Mother readily concedes that the purpose of these ESY services was to advance J.L.'s skills and that J.L. did make progress in ESY, although she attended only 12 of the 22 ESY sessions offered.

The hearing officer has determined that as the appropriate remedy in this case the respondent must offer compensatory EH services to J.L. She will be at a new middle school this year, since she is beginning the sixth grade. Therefore, the District must offer the compensatory time to her at the new school. The IEP supplied no guarantee that J.L. would achieve any given academic level as the result of her EH services and the hearing officer will not order services until any such level is achieved. The IEP merely provided for those services at the rate of 2 1/2 hours per week.

As the result of the respondent's violation of the IEP between November 29, 1993, and May 3, 1994, inclusive, the hearing officer calculates that J.L. was denied 25 1/3 hours of EH services required by the IEP. However, the District provided for compensatory services on two Fridays amounting to 1 1/3 hours of compensatory time. Additionally, the one hour per day that J.L. spent in ESY services on a one-to-one basis also qualifies as

compensatory time. The hearing officer will not credit the school District with ESY services spent in group activities or when J.L. was on summer vacation, since those activities are either not comparable to her EH services as offered under her IEP or were not compatible with her family activities during the summer. Therefore, the hearing officer concludes that J.L. should be provided with an additional 12 hours of compensatory services as the result of the violation.

V.

DECISION

Based upon the above findings and conclusions, it is the decision of the hearing officer that:

1. J.L. was denied a free appropriate public education during the period between November 29, 1993, and May 3, 1994, inclusive. However, the School District has already provided J.L. with compensatory services which partially compensate her for the violation. Hence, the District shall provide J.L. with EH services as designated by her IEP for an additional 12 hours in compensatory services during the first semester of the 1994/95 school year at her new middle school in the Respondent school district.

Dated in Denver, Colorado, this 1st day of September, 1994.

Respectfully submitted,

Joseph M. Goldhammer
Hearing Officer
1563 Gaylord Street
Denver CO 80206
(303) 333-7751
FAX (303) 333-7758

CERTIFICATE OF MAILING

The undersigned certifies that a true copy of the foregoing Finding and Decision along with a copy of the State Plan provisions regarding state level review (pp. 36-40 - State Plan) has been placed in the United States mail, postage prepaid, addressed to:

Certified Mail #P 296 532 829
Return Receipt Requested
Melinda Badgley Orendorf
409 North Main, Suite 413
Pueblo CO 81003

Certified Mail #P 296 532 830
Return Receipt Requested
Jill S. Mattoon
Petersen and Fonda
650 Thatcher Building
PO Box 35
Pueblo CO 81002-0035.

Certified Mail #P 296 532 831
Return Receipt Requested
Pamela Jacobson
Director of Special Education
Pueblo School District #60
315 West 11th Street
PO Box 575
Pueblo CO 81002

Certified Mail #P 296 532 832
[redacted]

this 1st day of September, 1994.

**Case Number: 93:516**

**Status:** Complaint Findings

**Key Topics:** Free Appropriate Public Education (FAPE)
Student Evaluation
Procedural Safeguards

**Issues:**

- Whether or not the district failed to provide FAPE by not evaluating student as a result of special education referral and providing subsequent appropriate education.
- Whether or not parents were informed of their right to special education referral and subsequent evaluation.

**Decision:**

- The district did violate the Act by not providing evaluation as a result of special education referral and a subsequent appropriate education.
- The district denied the parents procedural safeguards by not informing them of their parental right to a special education referral and subsequent evaluation.

**Discussion:**

- Mother stated that she had asked for special education referral for the past seven years and had been told by the school that the problems were behavioral. School district has no document of requests for referral.
- Parents obtained an outside evaluation for the student which indicated learning problems.

## FEDERAL COMPLAINT NUMBER 93:516

## FINDINGS AND RECOMMENDATIONS

### I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on December 7, 1993.

B. The complaint was filed by Mr. and Mrs. A.R. on behalf of their daughter, V.R., against Denver Public Schools, Dr. Evie G. Dennis, Superintendent and Ms. Pat Hall, Special Education Director (the district).

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

F. The timeline within which to investigate and resolve this matter expires on February 4, 1994.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint and consideration of relevant case law and federal agency opinion letters.

### I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

(1) failing to provide V.R. a free appropriate public education (FAPE) by:
- not evaluating her as a result of a special education referral and
- not providing a subsequent appropriate education, and by

(2) failing to provide Mr. and Mrs. R. procedural safeguards by
- not informing them of their parental right to a special education referral and subsequent evaluation.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16), (17), (18), and (20) and 1414.

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.128, 300.130, 300.131, 300.133, 300.180, 300.220, 300.235, 300.237, 300.300, 300.340, 300.343, and 300.530, 300.531, 300.532, 300.533, and 300.562.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will identify, locate, and evaluate all children with disabilities who are in need of special education and related services.

4. Another assurance made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

5. Should a parent request evaluation for special education, that evaluation must be made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of the suspected disability and no single procedure may be used as the sole criterion for determining an appropriate educational program for a child.

6. Every school year each student attending a Denver Public School receives a copy of a pamphlet entitled "Information for Parents" to take home. Under the heading, "Education of handicapped students", it states, "The school district is responsible for working with parents and staff members and parents to identify any students who may not be able to profit from the regular educational program because of handicapping conditions. Any questions should be directed to the principal of the school the student attends or to the Department of Special Education."

7. Documentation submitted by the District indicates that V.R. attended Denver Public Schools since 8/86 in schools with teachers and grades as follows:

| School Year | Grade | School | Teacher | Average Grades |
|---|---|---|---|---|
| 86-87 | K | Smedley | | |
| 87-88 | 1 | Smedley | | S |
| 88-89 | 2 | Smedley | | S |
| 89-90 | 3 | Kaiser | E. Marques | B - |
| 90-91 | 4 | Kaiser | Wendy Pierce Connor | C+ |
| 91-92 | 5 | Kaiser | Patricia Sieders | C |
| 92-93 | 6 | Horace Mann | | C - |
| 93-94 | 7 | Horace Mann | | C - |

8. A review of V.R.'s grades indicates that they dropped each year compared to the previous year.

9. Mrs. R. states that she has attempted to obtain educational assessment from the Denver Public Schools for the past seven years to determine V.R.'s special needs, but that these attempts were unsuccessful. She states that she specifically asked Dr. Guevara, principal at Horace Mann, for special education assessment in the fall of 1992. She stated that Dr. Guevara indicated that school personnel needed to observe V.R. first, and would decide if assessment should be completed. Mrs. R. states that Dr. Guevara contacted her later, saying they would not provide assessment for special education, as V.R.'s problems were related to behavior, not learning. Mrs. R. states that she continued to make these requests through April, 1993, at which time they were again denied.

10. Kathleen Van Zant, special educator at Smedley School, states that, to her knowledge, V.R. was never referred for special education evaluation.

11. Ann Wanker, special education teacher and staffing chairperson for Kaiser School, states that V.R.'s parents did not request a special education evaluation, to her knowledge.

12. E. Marques, V.R.'s third grade teacher, states that she found it necessary to conference with V.R. and her mother often about V.R.'s behavior, but that V.R. was a capable student.

13. Wendy Pierce Connor, V.R.'s fourth grade teacher, states that she had numerous conversations with Mrs. R. about V.R.'s attitude and behavior, but that her behavior incidents were not excessive enough or severe enough to warrant a special education referral. She also states that V.R.'s academic needs were being addressed in the regular classroom and IAP (Chapter I) program. She does not recall ever discussing Special Education or the referral process with Mr. or Mrs. R by their instigation or hers.

14. Patricia Sieders, V.R.'s fifth grade teacher, states that V.R. was a very capable student, but that she did often earn unsatisfactory grades because she chose not to pay attention or to complete the work. She recalls being questioned by Mrs. R. as to whether she thought V.R. was in need of special assistance, but that Mrs. R. did not ever request special education assistance for V.R. nor did she request any form of testing to be done to determine if V.R. was in need of any further assistance.

15. Linda Mitts, special educator at Horace Mann Middle School, states that she and Martha Guevara, the principal, had a conference with Mrs. R. during which time Mrs. R. expressed her concern about V.R. coming to Horace Mann. Linda Mitts told Mrs. R. that they would keep an eye on her and see if they could see any learning problems. In the spring, Linda Mitts checked with Linda Younker, the 6th grade special education teacher, who stated that in her opinion, V.R. was not exhibiting learning problems, but rather behavior problems.

16. Ms. Linda Carbajal, a reading specialist at Keystone Learning Center and a neighbor of Mrs. R., stated in a telephone conversation on 1/10/94, the following:

    She conversed with Mrs. R. over a two year period about the need for testing for V.R. When she first spoke with Mrs. R. about her concerns, she asked Mrs. R. why she didn't have V.R. tested at school. Mrs. R. stated that she has requested that since the first grade but that they have always refused, stating that it was just a behavior problem.

In the fall of 1992 Ms. Carbajal suggested to Mrs. R. that she ask again. In the spring of 1993 Ms. Carbajal asked Mrs. R. if V.R. had been evaluated. Mrs. R. responded that she had asked, but they refused. Mrs. Carbajal suggested that she ask again. Ms. Carbajal stated that Mrs. R. responded by saying she did ask again, but was told that nothing is wrong...just behavior. Ms. Carbajal then suggested that private testing be done through Children's Hospital.

17. Mrs. R. initiated a request for assistance on 9/1/93, indicating that she had V.R. tested over the summer at Children's Hospital at her expense. Mrs. R. signed a consent for individual evaluation form on 9/23/93.

18. Results of testing completed at Children's Hospital include the following:

(a) V.R.'s Verbal and Performance I.Q. scores (mentally deficient and low average) were significantly discrepant with her Full Scale I.Q. falling within the borderline range.

(b) Diagnosis included Attention Deficit Hyperactivity Disorder (ADHD), Borderline Intellectual Functioning and Developmental Language Disorder.

(c) Inconsistent processing of auditory information and directions.

(d) Variable memory skills.

(e) Moderate to significant delays in visual perception.

(f) Significantly impaired receptive language skills which were overall commensurate with cognitive testing.

(g) Variable academic skills which are impacted by inconsistent memory and attention in addition to overall language deficits.

(h) Significantly delayed general knowledge.

19. A placement staffing and IEP meeting was held on 10/14/93 but was not completed apparently due to the need for auditory processing testing results as well as an OT/PT evaluation. Auditory processing testing results were given to the team on 10/21/93. OT/PT evaluation was completed on 12/3/93. The IEP was then completed on 12/15/93. Evaluation was thus completed 63 school days after the special education referral and 48 days after signed parent permission to assess. The IEP was completed 71 school days after the special education referral and 56 days after the signed permission to assess.

20. Evaluation results from Denver Public Schools indicate the following:

(a) student lacks productivity due to short attention span (next to none) and attention seeking behavior

(b) mother has noticed problems since kindergarten, especially at the 4th and 5th grade levels

(c) serious deficits in adaptive behavior...scored low on areas of self-direction, prevocational activities, numbers & time, and independent functioning.

(d) motor skills within a typical range for her age

21. The IEP for V.R. developed on 10-14-93 and completed on 12-15-93 indicates the following:

    (a) V.R. has a primary handicapping condition of Physical Disability and a secondary handicapping condition of speech/language.

    (b) Annual goals include the improvement of reading skills, vocational skills, figurative language, written language skills and math skills as well as increasing critical thinking skills and understanding of social clues.

    (c) V.R. is to receive the following direct special education services: 180 minutes from an itinerant teacher of physical disabilities, 135 minutes from a resource teacher of physical disabilities and 225 minutes from a speech/language resource specialist which total 9 hours of special education per week, beginning 12/16/93.

22. While Mrs. R. believes she has asked for special education evaluation since V.R. was in the first grade, the District does not recall any requests for special education evaluation prior to the fall of 1993 and no documentation exists to support such a request. The District does admit that V.R. did often earn unsatisfactory grades in the fifth grade because "she chose not to pay attention or to complete the work" and that Mrs. R. asked the teacher if she thought V.R. was in need of special assistance. The District also admits that Mrs. R. was very concerned about V.R. when entering the 6th grade but that the 6th grade special education teacher's opinion was that V.R. was not exhibiting learning problems, but rather behavior problems. A neighbor of Mrs. R., who served as an advocate due to her experience as a reading teacher, has firmly stated that Mrs. R. relayed to her having requested assessment in the fall of 1992 and again in the spring of 1993 and that both requests were denied. Mrs. R. did then obtain evaluation at her own expense in the summer of 1993.

## III. CONCLUSIONS

1. It is the conclusion of this office that the District did violate the Act by not providing evaluation as a result of a special education referral and a subsequent appropriate education in the fall of 1992. Although there is no documentation of a written special education referral, it is evident that Mrs. R. was asking for some evaluation and that the District responded by unilaterally determining that problems were due to behavior, not learning; and therefore a special education referral was not warranted. One year later, after Mrs. R. obtained evaluation privately, the district did determine that V.R. had learning problems which were not just the result of behavior.

2. Since Mrs. R., in the fall of 1992, did exhaust one of the two options given to her in the parent information pamphlet by directing questions to the principal, and the principal unilaterally determined no need for a special education referral, the District did deny Mr. and Mrs. R. procedural safeguards by not informing them of their parental right to a special education referral and subsequent evaluation even if the principal disagreed with the referral.

3. The District violated the Act by not providing evaluation and determination of disability within 45 days from the date of the written special education referral.

4. V.R. has received a full special education evaluation and is currently receiving free appropriate public education as determined by the IEP committee of which Mrs. R. was a participant.

5. Although V.R. is currently receiveing appropriate services, she was denied those services during the 1992-93 school year and the first 14 weeks of the 1993-94 school year. Assuming services would have been similar to those currently identified as appropriate, V.R. was denied approximately 450 hours of special education (9 hours X 36+14 weeks = 9 X 50 = 450 hrs). It is not always appropriate to calculate denied services, but appears to be in this case; and V.R. may be entitled to additional special education. Since the IEP committee determined an appropriate education for the remainder of the school year, however, adding additional special education to her current program would not necessarily be beneficial.

## IV. REMEDIAL ACTIONS

On or before the end of the current school year, the district must reconvene the IEP committee to determine weather or not V.R. would benefit from additional special education services (not to be confused with extended school year services) during the summer of 1994, to compensate for those services denied, and if so, to develop an IEP for the summer and provide those services.

On or before June 15, 1994, the district must provide this office with a copy of the results of the above meeting.

Dated this 4th day of February, 1994

Carol Amon

Carol Amon, Federal Complaints Coordinator

**Case Number: 94:503**

**Status:** Complaint Findings

**Key Topics:** Related Services (Transportation)

**Issues:**

- Whether or not district failed to provide transportation in accordance with the IEP which states that the student shall receive curb to curb transportation daily.

**Decision:**

- The district complied with the IEP by providing curb to curb transportation daily.

**Discussion:**

- Notation from parent indicates that 1 and 1/2 hours daily is the maximum tolerable length of bus ride. Average length of time spent on the bus is between 140 to 220 minutes daily.
- Alternative placement may be considered to reduce the amount of time spent on the bus.

## FEDERAL COMPLAINT NUMBER 94.503

## FINDINGS AND RECOMMENDATIONS

### I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on March 14, 1994.

B. The complaint was filed by Ms. S. L. on behalf of her son, D.L., against the Jefferson County School District R-1, Dr. Lewis Finch, Superintendent and Dr. Robert Fanning, Special Education Director.

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. D.L. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on May 13, 1994.

H. The complaint was held in abeyance from 4/1/94 through 4/21/94, at the complainants request, due to the district's having resolved the transportation issue. However, Ms. L. requested that the complaint be reactivated on 4/21/94 due to the resolution no longer being implemented.

I. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint and consideration of relevant case law and federal agency opinion letters.

### I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act, by allegedly failing to provide transportation to D.L. in accordance with his IEP.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) and (20), and 1414

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343 and 300.346

Fiscal Years 1992-94 State Plan Under Part B of the Individuals With Disabilities Education Act

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

4. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child. In carrying out its responsibilities, the district identified D.L. as an eligible student with disabilities and developed an IEP for him.

5. Related services, as used in the Act, means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. Transportation includes travel to and from school and between schools, travel in and around school buildings, and specialized equipment if required to provide special transportation for a child with a disability.

6. The IEP developed for D.L. dated 2/25/94, states that transportation curb to curb daily with decreased length of ride to and from school will be provided as a related service. Although there is a notation that Ms. L. reports the maximum tolerable length of bus ride is to be no greater than 1 and 1/2 hours per day, there is no indication of the specific length of bus ride as part of related services.

7. D.L. attends Margaret Walters School as part of the district's open enrollment process. Both the district and Ms. L. agree that it takes 20 to 30 minutes to maneuver a bus through traffic from home to school, if the bus were not to stop for other students.

8. In a letter dated 4/21/93, Ms. L. indicates that, in the past, the bus ride to school had routinely been from 80 to 100 minutes per day and that the ride home varied from 60 to 120 minutes (total 140 to 220 minutes per day or 2 hours, 20 minutes to 3 hours, 40 minutes).

10. As part of the complaint dated 3/11/94, Ms. L. indicates that the bus ride to school continues to be 75-80 minutes and the bus ride home is from 55-65 minutes (total 130-145 minutes or 2 hours,10 minutes to 2 hours 25 minutes).

11. Correspondence from the Director of Special Education dated 3/31/94 indicates that the length of the bus ride to school had decreased by 10 minutes and the length of the ride home from school has decreased by 33 minutes, since the development of the IEP.

12. Regardless of time spent on the bus, D.L. does receive curb to curb transportation daily.

13. The District is willing to reconvene an IEP meeting and consider having D.L. attend another school program which can meet his needs and reduce even further the amount of time on the bus.

## III. CONCLUSIONS

It is the conclusion of this office that the District did not violate the Act by not providing transportation as a related service in accordance with what was specified on D.L.'s IEP. Although the District acknowledges the amount of time D.L. spends on the bus in lengthy, it has provided daily curb to curb transportation with decreased length of ride to and from school.

## IV. REMEDIAL ACTIONS

None.

## V. RECOMMENDATIONS

Since concern has been expressed regarding the lengthy bus rides as they relate to D.L.'s behavior, it is recommended that the IEP team reconvene to consider the maximum amount of time D.L. should spend on the bus and, if appropriate, alternative placements which would allow for shorter bus rides.

Dated this 28th day of April, 1994

Carol Amon

Carol Amon, Federal Complaints Investigator

**Case Number: 94:504**

**Status:** Complaint Findings

**Key Topics:** Discipline
Individualized Educational Plan (IEP)

**Issues:**

- Whether or not the district provided services in accordance with the IEP.

**Decision:**

- The district did not fail to provide the services on the IEP.

**Discussion:**

- The grandmother is concerned that time out is used as a punishment.
- Use of other behavior modifications besides time out was discussed.

**FEDERAL COMPLAINT NUMBER 94.504**

**FINDINGS AND RECOMMENDATIONS**

## I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on March 21, 1994.

B. The complaint was filed by Ms. P.M. on behalf of her grandson, C.M., against the Denver Public Schools, Dr. Evie G. Dennis, Superintendent.

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. C.M. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on May 20, 1994.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint, an onsite visit to Montclair Elementary school and consideration of relevant case law and federal agency opinion letters.

## I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act, by failing to provide services to C.M. in accordance with his IEP.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) and (20), and 1414

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346.

Fiscal Years 1992-94 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child. In carrying out its responsibilities, the district identified C.M. as an eligible student with disabilities on 9/20/91, and developed an IEP for him. This IEP, assessment reports and subsequent reviews indicate the following:

   Functioning:
   Has average intellectual potential, normal cognitive skills, good language skills
   Diagnosed as having Reactive Attachment Disorder; is on Ritalin for ADD
   Has significant issues in areas of self-concept, emotional security development of trust
   Tends to be impulsive, controlling, oppositional, distractible and overly active.

   Needs:
   to form close relationships with his peers and teachers
   to increase attention span, interactive communication skills,
   to improve coping strategies, self regulation of behavior, social interaction skills
   to improve time on task, peer relationships, following directions
   to decrease tantrum behaviors, aggressive behaviors, impulsivity
   to learn self-regulation skills, emotional expression, and adaptive coping skills

   Characteristics of Service:
   structured consistent environment with clear consequences
   clear, concise directions and clear expectations
   positive reinforcement
   behavior management and support for emotional development
   small group, individualized instruction; integrated setting with peer modeling
   close coordination between home and school to provide consistency

4. An annual review of C.M.'s IEP was held on 12/17/92, which called for 3.5 hours a week of special education services.

5. C.M. entered kindergarten at Montclair Elementary School in the fall of 1993. Sarah Flanders, Special Education Teacher at Montclair, states that she provided services to C.M. with another kindergartner for 45 minutes a day, 5 days per week which totaled 3.75 hours per week. This indicates the services identified on the 12/17/92 IEP were provided.

6. Another annual review for the purpose of changing handicapping condition was held on 10/19/93. P.M. attended that meeting. Services to be provided were "Other Health Impaired, Resource, Special Educator, 30 minutes a day, 5 times per week" and "ED, Resource, Special Educator, 30 minutes a day, 5 times per week". The IEP also indicated that "We will try full day program-AM in kindgrtn and PM in grade 1 and special Ed...evaluate in one month".

7. Sarah Flanders states, "It was a joint decision by the entire staffing team that we should try an all-day program for C. in order to provide more structure in his day. We made arrangement for him to join a first grade class at the end of the kindergarten morning. At 2:00 he came to me for one hour of resource time in a small group setting. After several weeks of this new schedule, it was apparent to Sara Smith, the kindergarten teacher, Staci Porter, the first grade teacher, and myself, that C. was having a difficult time with the longer day. We called P.M., C.'s grandmother, and she was in agreement. She was seeing regressive behavior at home. Via a telephone conversation, it was decided that we (P., Sara, and I) would resume the previous half day schedule and meet as soon as possible. This phone call occurred just before the Thanksgiving recess. We agreed to set up a meeting as soon as possible and that C. would resume his half day schedule right after Thanksgiving." This indicates the services identified on the 10/19/93 IEP were provided.

8. A meeting was held to review the IEP on 1/6/94. P.M. attended that meeting. Services to be provided were "OHI Consult, Sp. Educator, 15 minutes 1 time per week and E.D. Consult, Sp. Educator, 15 minutes 1 time per week from 1/6/94 through 5/3/94". A General Addendum to the IEP also lists ten specific services or modifications to be provided. (See Finding #10.)

9. Sarah Flanders states that she has met and will continue to meet with Sara Smith, the kindergarten teacher, weekly, to provide consultation.

10. Sara Smith, Kindergarten teacher at Montclair, has stated that the specific services and modifications listed on the General Addendum to the IEP have been and are currently being provided, except for the use of a bar graph which was discontinued with P.M.'s approval. P.M.'s responses and perceptions are quite different from Sara Smith's. Sarah Flanders states, "...it is my feeling that each and every item on that addendum has been implemented to the best of our ability. Sara and I discuss these items weekly." The following is a listing of these services, Sara Smith's and P.M.'s responses.

**Debrief after time out**

S.S.: "When the student is put in time-out he is debriefed as to what classroom rule he has broken. The classroom rules were presented at the beginning of the year and are reviewed periodically. "

P.M. : "C. is punished every day by being placed in time out one, two or three times; this is during a 2 and 1/2 hour period. If you ask him, he does not know why. His teacher indicates the following reasons: (read from C.'s Daily Reports) talkative, out of seat, can't sit still, calling out, very active, did not focus on work, semi-wild up and down, zip-zip, did not take medication as directed (nurse was not in office to provide them on time, but C. was punished), left playground to see school nurse when hurt, did not finish work, was fooling around. I believe he is being punished for ADHD behavior which he has no control over. Time out doesn't mean anything to him, he just gets it all of the time and he doesn't know why. He never gets any positive rewards."

Debriefing appears to be occuring, however the effectiveness of that is viewed differently by the staff and the grandparent.

**Use of back and forth chart with information included on behavior, moods and academics with comment section**

S.S.: "The back and forth sheet sample is attached. (Date, Today C. had a ___ day, His behavior was Excellent, Very Good, Good, O.K. Poor, Very Poor, He was in time out ___ times. The reason was ____. Comments) This folder full of back and forth sheets went home with short notes from the teacher on C.'s behavior"

P.M.: "Back and forth forms are being used, but only describe his behavior and the number of times in time-out. They say nothing about redirecting or modifications that worked. She seems to focus on bad behavior. Time-out as punishment daily seems to be the only teaching skill and the only modification."

Although the chart is to include information on behavior, moods and academics, it appears to focus on time out and not on positive behavior, behavioral interventions and academics.

**Use of bar graph when colored in, P. gives a reward**

S.S.: "This system of positive reinforcement was implemented one week after the January 6 meeting then discontinued. This method of positive reinforcement was too distracting...Mrs. M's and my joint decision..."

P.M.: "This was started late; it set him up for failure."

Note: Sarah Flanders states that it was at P.M.'s request that the bar graph be discontinued.

**Work for home, designed by teachers**

S.S.: "C. was given a copy of a math book work book and was given a "Getting Ready to Read' book."

P.M.: "We did get those and we use them."

**P. to keep in contact with Sara Smith only as contact person**

S.S.: "I have called Mrs. M. and asked her to come into the classroom and meet with me. She has not come in. I have also asked Mrs. M. to visit the classroom so she could see our daily routine. She has not done this...Mrs. M. has called a couple of times...I have called as well to ask about medicine changes, notes sent home, stolen items, and classroom behavior."

P.M.: "I'm only allowed to speak to one person, and that should be her; but I feel distressed. I don't know what to say to her. If I see her directly, she doesn't look at me. I feel so helpless. She seems defiant and I don't believe what he needs is punishment. When I send her notes asking what she is doing to redirect, there is no response."

**Two positive prompts for time on task**

S.S.: "This does occur regularly. C. works well when positively reinforced."

P.M.: "I don't believe she's doing that. She just uses daily punishment. C. said, 'Mama, you promised to keep me safe; I'm never going back to school." This year has done great harm. It's always C.'s fault."

**Life Skills Instruction**

S.S.: "This had occurred prior to our 1/6/94 meeting and is reinforced on a regular basis."

P.M. "The only life skills taught are 'don't talk' and don't fight'."

The staff appears to be providing life skills instruction, however the content and effectiveness of that appears to be perceived differently by the staff and the grandparent.

**Teacher modeling**

S.S.: "This is done daily with proper language use and role playing. Role playing is done with student/student and teacher/student scenarios."

P.M.: "Well I've never seen her misbehave."

**Eventually create his own solutions to meet his needs**

S.S.: "...I ask C. to monitor his behavior, so he in turn can internalize right and wrong...C. completes most teacher assigned tasks, although he typically rushes."

P.M.: "I don't know how to judge this. When C.'s medicine changed, his behavior was much better at home, but her notes didn't indicate any change. He was punished as much after the change as before."

**Every two weeks, Sarah F. and Sara S. to communicate with P.**

S.S.: "As part of the consultation process, Sarah Flanders and I meet weekly to discuss C.'s progress, what is working, what is not working, and problem solve solutions. It was decided...that it would be helpful if we met every two weeks with Mrs. M. for the same purpose and to enhance communication. I have telephoned her and invited her to these meetings and she has never attended."

P.M.: "Once when I called her, she invited me to come in, but she never called and invited me. I can't think of anything more to say to her; I don't think punishment every day is good teaching."

Note: Sarah Flanders states that P.M. has not attended the meetings that were set up for her and has not observed in the classroom as was recommended by everyone.

11. Perceptions about the effect of the school's services on C.'s self-esteem vary greatly between P.M. and staff at Montclair Elementary. P.M. states, in her complaint, that "The results of C.'s experiences in Mrs. Sara Smith's kindergarten class have left him totally lacking self-esteem and open to ridicule by his peers". She also stated that he does not want to go to school because he is punished constantly for things over which he has no control, typical ADD behavior. Sarah Flanders, the special education teacher, states in her response, "C. was and continues to be a delightful child. He does have behavior problems but we, at Montclair, feel that his needs are being met in the regular classroom. He is learning and growing, and the self esteem problems and ridicule that are alleged in P.M.'s complaint are not manifested in the school setting". Four members of the staff at Montclair Elementary indicated, during an interview, that C. is a happy, smiling, affectionate, average child who is engaged in learning and that he does not appear to be lacking in self-esteem.

12. Perceptions about the purpose and use of time out vary greatly between P.M. and staff at Montclair Elementary. P.M. views time out as a punishment which occurs two to three times per day and causes feelings of poor self-esteem. The staff feel this is an effective method of kindergarten programming, where students are physically moved away from the group for a period of time. Staff believes that positive behaviors are reinforced at least five times as often as negative. Sara Smith, kindergarten teacher, indicated that time out is administered through a progressive card system were the child may return to the group as soon as he or she wishes the first time, and is asked to remain separated for as long as 15 minutes on the second time.

## III. CONCLUSIONS

Although it is the conclusion of this office that the District did not violate the Act by failing to provide services in accordance with what was specified on C.M.'s IEP, the difference between the grandmother's and the teachers' perceptions of the effectiveness of those services as well as C.'s functioning and needs is of great concern. All parties appear to agree that C. needs a behavior plan with support for continued emotional and social development and that close coordination between home and school to provide consistency is imperative. However, this is clearly not happening.

## IV. REMEDIAL ACTIONS

None.

## V. RECOMMENDATIONS

It is recommended that action be taken to promote communication and coordination between the home and school, specifically to prevent this discrepancy in perceptions during the next school year. It appears that there needs to be some clarification and understanding of (a) whether or not C. can control the behaviors for which time out is being utilized, (b) the effectiveness of the use of time out for C. given his diagnosed disability relating to attachment disorder and attention deficit disorder, (c) the relationship between negative and positive reinforcement, and (d) whether or not multiple options to respond to children with behavior difficulties are being utilized. To facilitate better communication in the future, the following is recommended:

(1) the behavioral specialist with Denver Public Schools observe C. in the classroom and provide feedback to the staff and the parent,

(2) the grandparent, P.M., visit the classroom for at least 45 minutes on several occasions to observe how the teacher interacts with the students and with C., and

(3) an IEP meeting be held at the beginning of the school year after observations have been completed to incorporate information gained through the observations and to agree on services and a possible behavior plan for next year.

Dated this 20th day of May, 1994

Carol Amon

Carol Amon, Federal Complaints Investigator

**Case Number: 94:505**

**Status:** Complaint Findings

**Key Topics:** Related Services (Counseling, O.T., Aids and Support)
Individualized Educational Plan (IEP)

**Issues:**

- Whether or not the district and BOCES have provided the specific services in accordance with the IEP, namely counseling, aids and support for tests, and occupational therapy.

**Decision:**

- Counseling and aid and support for tests were provided for as required on the IEPs.
- The amount of time that O.T. services were provided was 10 minutes less than called for on the IEP due to illness of the occupational therapist, however the district and BOCES are in substantial compliance.

**Discussion:**

- Services and modifications were requested by the parents in addition to those on the IEP.
- The parents feared recrimination or discrimination because of participation in the complaint procedure.

## FEDERAL COMPLAINT NUMBER 94.505

## FINDINGS AND RECOMMENDATIONS

### I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on March 22, 1994.

B. The complaint was filed by Mr. and Mrs. B.S. on behalf of their son, Z.S., against the Strasburg School District 31-J, Mr. Bruce Yoast, Superintendent and the East Central Board of Cooperative Education Services (BOCES), Mr. Fred Patterson, Director of Special Education.

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district and the BOCES as recipients of federal funds under the Act. It is undisputed that the district and the BOCES are program participants and receive federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. Z.S. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on May 20, 1994.

H. Mr. Fred Patterson, Director of Special Education, in a letter dated 3/12/94 indicated his belief that the issues were resolved and that the parents might withdraw the complaint. However, Mrs. S, in a telephone conversation on 3/31/94 and in a letter dated 4/7/94 indicated a desire to continue with the complaint.

I. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint and consideration of relevant case law and federal agency opinion letters.

J. Colorado State Board of Education Policy No. 1280.0. states that "No complainant shall suffer recrimination or discrimination because of participation in this complaint procedure." Mr. and Mrs. S. in a letter dated 4/7/94 state, "We NOW have fears and concerns that the actions we took to write a letter of complaint, may have a negative impact on how Z. might be treated, And that our trust and creditability may now be in question."

## I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district and BOCES have violated the provisions of the Act, by failing to provide specific services to Z.S. in accordance with his IEP, specifically:

- counseling.
- aids and support for tests in science and social studies and
- occupational therapy services.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) and (20), and 1414,

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346

Fiscal Years 1992-94 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the district and BOCES were receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid , in part, based on the assurances contained within the application.

3. One of the assurances made is that, in accordance with the Act, a free appropriate public education will be provided, including special education and related services, to each eligible student with disabilities within the applicant's jurisdiction to meet the unique needs of that child. In carrying out its responsibilities, the district and BOCES identified Z.S. as an eligible student with disabilities.

4. The IEP for Z.S. dated 5/18/93, lists the following Characteristics of Service as part of placement in regular education with consultation and pullout:

   Language Development: 30-40 minutes per week
   Basic Skills ((Math, Reading, Language Arts): 10-15 hrs. per week. (Math instruction in the resource room, complete assignments in the classroom; written expressive language in the regular class with tape.
   Modified Curriculum: Modify evaluations by using computer and tape
   Counseling: as needed for coping skills
   O.T. as a related service for 30 minutes per week.

5. The IEP for Z.S. dated 3/14/94, lists the following Services as part of placement in regular education 66-73% of the time:

   Resource Room: 12-14 hours per week for math, reading and writing.
   Counseling to identify own emotions and expressing them appropriately: 30 minutes, one time per week
   O.T. as a related service for visual motor integration: 20-30 minutes weekly
   O.T. consultation for keyboarding
   S.L. therapy: 30-40 minutes per week
   Modify curriculum, assignments and evaluation based on cognitive.

6. The complaint states that Z. has not received any counseling during this school year. The IEP in effect from 5/18/93 to 3/14/94 states "counseling as needed". The BOCES' response to the complaint states that prior to 3/14/94, "little, if any, counseling was provided. However, the statement on the IEP, agreed to by all parties, is too vague to support a conclusion that the district failed to provide the service.

   The IEP in effect from 3/15/94 through the remainder of the school year states, "counseling 30 minutes one time per week". The BOCES' response to the complaint states, "Since the IEP meeting in March, a regular counseling schedule has been established with the counselor". Mr. and Mrs. S., in a letter dated 4/7/94 state, "We are happy to report that Counseling For Z. has been addressed...Z. has reported he is receiving this service..." Therefore, the district and BOCES have not failed to provide counseling services in accordance with Z.S.'s IEPs.

7. The complaint states that there is no one to aid or support Z. for testing in science and social studies on a regular basis. The BOCES' response to the complaint indicates that in the past, several different people, including peer tutors on occasion, were working with Z. to help him with tests, which must be read to him. It also indicates, "The process now in place is that tests will be read to Z. by the classroom teacher. If, for some reason, the classroom teacher is not able to read the questions, Z. and the test will be sent to the resource room so that the questions can be read by Julie Winter." Julie Winter, during a telephone interview stated, "I am not always available at the time a test is given to go into the classroom; in the past either the teacher or a student would read these if I wasn't available." She also indicated that the new process, as outline by BOCES, was being utilized. Mr. and Mrs. S. in a letter dated 4/7/94 indicate their desire for Z. to stay in the regular classroom as much as possible including when tests are given. The district has not failed to provide aids and support for tests in science and social studies as identified on Z.'s IEP. A new IEP would need to be developed if Mr. and Mrs. S. wish further clarification or restrictions of this service.

8. The complaint states that the school has failed to provide Z. with the appropriate supplemental aids and supports that would permit him to be successful in the regular education classroom. The specific concern of the parents is that when the O.T. is absent, she is not replaced. Even though time may be made up by the following week and by doubling the service, they question if this is appropriate for Z. since he does well with routine and consistency. The 1993 - 1994 Occupational Therapy Report regarding Z.S., submitted by the BOCES indicates:

   > From 9/2/93 through 4/13/94 there were 35 possible calendar days for O.T. services. School was not in session 5 of those days (1-Thanksgiving, 2 Christmas, 1 Spring Break, 1 Snow day), leaving 30 possible days for receiving O.T. Services. O.T. services were provided to Z. for 30 minutes on 16 of those days and for 40 minutes on 5 additional days, for a total of 21 days. Of the remaining 9 days, Z. was absent 6 days (12/6, 12/8, 1/5, 2/2, 3/23, and 4/11), the O.T. was sick 2 days and one day Z. remained to listen to a class speaker.

   Since Z. received an extra 10 minutes of service on 5 days for a total of 50 minutes, that leaves a discrepancy of a total of 10 minutes regarding the provision of IEP services in accordance with the IEP. Although Mr. and Mrs. S. would prefer that a substitute O.T. be employed to provide O.T. services during the O.T.'s absence due to sickness, the district and BOCES appear to have made an effort to provide the needed services. Therefore, they are in substantial compliance with the Act.

III. CONCLUSION

It is the conclusion of this office that neither the District nor the BOCES violated the Act by failing to provide services in accordance with what was specified on Z.S.'s IEPs. Mr. and Mrs. S.'s requests to have additional services or modifications listed on the IEP (to have Z. spend more time in the regular classroom, to have more specific curriculum modifications, to have the provision of an Aide to teach Z. notes and fingering, and to have additional mainstreaming for math) are not within the remedies available through the complaint process. These requests for modifications to the IEP must be addressed by an IEP committee.

IV. REMEDIAL ACTIONS

None.

V. RECOMMENDATIONS

It is recommended that the district and the BOCES assure Mr. and Mrs. S that neither Z. nor they will suffer recrimination or discrimination because of participation in this complaint procedure."

Dated this 20th day of May, 1994

Carol Amon

Carol Amon, Federal Complaints Investigator

**Case Number: 94:506**

**Status:** Complaint Findings

**Key Topics:** Individualized Educational Plan (IEP)
Transitional Programming

**Issues:**

- Whether or not the district failed to provide transition services as required on the IEP.

**Decision:**

- The district provided the services that were listed on the IEP, however transition services which should have been on the IEP as part of a transition plan were not included, thus the district was ordered to develop an IEP/transition plan.

**Discussion:**

- Requirements of needed transition services and linkages with other public agencies in providing those services not included.

**FEDERAL COMPLAINT NUMBER 94.506**

**FINDINGS AND RECOMMENDATIONS**

## I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on March 28, 1994.

B. The complaint was filed by Mr. and Mrs. K.K. on behalf of their son T.K., against the Saint Vrain Valley Schools District, Dr. Fred Pierce, Superintendent and Ms. Mary Sires, Director of Special Education.

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. T.K. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on May 27, 1994.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint, and consideration of relevant case law and federal agency opinion letters.

## I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act by:

- failing to provide services to T. K. in accordance with:
  - the Characteristics of Services on his IEP and
  - accompanying Transition Planning Notes, and
- failing to fulfill additional obligations for services to T. K. which the district has undertaken as a result of the written correspondence from Bob Roggow and Kathy Bowman to Mr. and Mrs. K..

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) (19) and (20), and 1414,

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.18, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346, and

the Fiscal Years 1992-94 State Plan Under Part B of the Act.

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child. In carrying out its responsibilities, the district identified T.K. as an eligible student with disabilities.

4. The IEP for each student, beginning no later than age 16, must include a statement of the needed transition services including, if appropriate, a statement of each public agency's and each participating agency's responsibilities or linkages, or both, before the student leaves the school setting.

   (a) Transition services means a coordinated set of activities for a student, designed within an outcome-oriented process, that promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.

   (b) The coordinated set of activities must be based on the individual student's needs, taking into account the student's preferences and interests.

   (c) The coordinated set of activities must also include needed activities in the areas of instruction, community experiences, the development of employment and other post-school adult living objectives, and if appropriate, acquisition of daily living skills and functional vocational evaluation.

   (d) If the IEP team determines services/coordinated activities are not needed in any of the above areas (stated in [c]) , the IEP must include a statement to that effect and the basis upon which the determination was made.

5. A review meeting was held 4/21/93 to develop an IEP for the 1993-94 school year, with Mr. and Mrs. K. in attendance. That IEP states:

   Special Education and/or Related Services Providers(s):
   Transition Specialist, 1-2 hours per week beginning the Fall of 1993,
   0 hours per week of special education services, and
   0 hours per week in the regular education setting.

6. A subsequent transition plan was begun on 5/19/93. The plan included desired future outcomes, current situations and needs relative to the nine areas listed below. The plan, however, did not go on to address services (a coordinated set of activities), responsibilities or linkages. According to that plan , T.K.'s needs were:

| | |
|---|---|
| VOCATIONAL: | current vocational assessment<br>to be kept busy in any work experience<br>safety monitored<br>job shadowing, possibly every 6 weeks<br>an advocate in vocational setting<br>interviewing skills<br>skill in initiating looking for a job<br>role playing experiences |
| RECREATION/LEISURE: | to learn to initiate activity with others |
| COMMUNITY INTEGRATION: | practice on scheduling appointments |
| DOMESTIC: | improve judgment as to appropriate clothing<br>to take improve care of his lips<br>to develop improved telephoning skills<br>continued practice with laundry<br>more practice cooking<br>see need for housekeeping |
| TRANSPORTATION: | to be able to adapt to changes in RTD bus schedule<br>opportunity to try driver's education<br>to develop skill of accessing taxi service |
| MEDICAL: | increase awareness and follow-through for accessing medical services |
| FINANCIAL/INCOME: | social security<br>parents to explore trust and will situation |
| ADVOCACY/LEGAL: | ??? |
| LIVING ARRANGEMENTS: | supports for independent living |

7. The district's response to the complaint states, "The Transition Planning Notes for T. dated 5/19/93 were the result of a brainstorming activity....The purpose of this meeting was to gather information for developing goals and objectives for the IEP. It was never the intent of the district to address and/or meet all the needs as identified in the notes, nor was it an expectation by the school district that the parents or outside agencies address or meet all of the needs. It was the intent, however, of the district to use the information to develop the annual goals/objectives which we attempted to do at the following meeting on 8/18/93 but finalized on 10/8/93."

8. A meeting was held on 8/18/93 to finalize goals and objectives for T.'s most recent IEP. This did not happen, according to a Memo to the T.K. file from Bob Roggow, dated 8/18/93, because of a number of concerns on the part of the parents. That memo provides a summary of the meeting and includes the following items relevant to the IEP:

BETA program involvement for T.K. over on 8/13/93
T.K. would stay in the transition program for monitoring
Discussed: transition class, volunteer work, evening adult education classes

9. A meeting was held on 10/9/93 to finalize the IEP. Two goals with two accompanying objectives were written. These were:
   T. will have vocational opportunities
   T. will participate in recreation/leisure activities with others.

10. Based on the district's response that the IEP includes that which was developed on 4/21/93, 8/18/93 and 10/8/93, the IEP for T.K. does not include the following:

    A statement of the needed transition services (a coordinated set of activities for T.K.), designed with an outcome-oriented process, relating to:
    vocation/employment,
    continuing and adult education,
    adult services (medical, financial, advocacy, etc.),
    independent living/daily living skills (housekeeping, cooking, laundry, telephone, clothing, medical, etc.), and
    community participation/experiences (recreation, leisure, etc.).
    A statement of responsibilities and/or linkages.
    A statement as to those transition areas in which no services or activities are needed, if any, and the basis upon which the determination was made.

11. The IEP does indicate that a Transition Specialist will be provided 1-2 hours per week for consultation beginning the Fall of 1993, and that T.K. would stay in the transition program for monitoring. A "log of dates and activities" provided as part of the district's response indicates that Kathy Bowman (K.B.), a transition specialist, was involved in consultation and monitoring for a total of 60 times between 9/15/93 and 4/20/94.

12. A letter from Bob Roggow, Supervisor of Special Education, to Mr. and Mrs. K., dated 6/21/93, states:

    It was agreed that T.K. could participate in a "Transition Class",

    It was agreed that we would pursue finding a work experience for T.K. beginning with the school year of 1993-4, if T. was not already employed,

    It was agreed that we would pursue finding volunteer work for T. dependent on whether we find him employment and the work time schedule involved,

    ...even though T. was inadvertently given his diploma, this would not interfere in any way with our proceeding with transition programming for him,

    ...need to meet in August...to finalize T.'s IEP

    If T. needs transportation for the Fall, 1993, we will work with you to facilitate it.

12. A letter to Mr. and Mrs. K. and T.K. from Kathy Bowman, dated 2/28/94, states:

    We are willing to assist him there [at the library where he was volunteering] to help him develop some marketable job skills through this experience and also to help ensure that this is a successful experience for him.

We will continue to explore competitive pay employment opportunities.

13. A letter to Mr. and Mrs. K. and T.K. from Kathy Bowman, dated 3/11/94, states:

    The ...Business Systems class was recommended...The coach who will assist T. at CDC beginning Monday, March 14th is Rachel Edwards. She will meet T. at the CDC office at 3:00p.m. She will help T. register for the class and assist T. every day, Monday through Thursday, the first week of class.

14. A letter to Mr. and Mrs. K. and T.K. from Kathy Bowman, dated 3/18/94, states:

    Since T. has had experience with RTD, I did not think he would need training for riding from CDC to your office...I will plan to meet with T....to discuss the route and "shadow" his transfer to CDC... I will make arrangements to have him "shadowed" from CDC...Following this monitoring, if we feel there are issues of concern regarding transportation, I or Mary or Bob will share with you...an outline of our plan for addressing these concerns.

15. In its response to the complaint, the district stated, "...while nothing was promised other than what was contained in the IEP, you will see numerous additional activities and support given by the school district staff on behalf of T....we have more than met obligations that the district made to the Ks. on behalf of T."

## III. CONCLUSIONS

The District did not violate the Act by failing to provide services in accordance with what was specified on T.K.'s IEP. It did provide those services. However, the district did violate the Act because the IEP developed for T. did not contain a statement of the needed transition services nor, as appropriate, a statement of responsibilities or linkages or both for the delivery of transition services as required by law and regulations.

Although subsequent, frequent communication occurred between the parents and the district, regarding what transition services should and would be provided, there is no clear documentation of those agreed to as part of the IEP process nor of those which were provided.

## IV. REMEDIAL ACTIONS

On or before July 1, 1994, the district must reconvene the IEP team to develop or complete a transition plan, to determine goals, objectives and activities related to transition needs of T.K. for the 1994-95 school year and, if appropriate, a statement of responsibilities or linkages, or both. If the team determines services are not needed in any of the transition areas, the IEP must include a statement to that effect and the basis upon which the determination was made. The team must also consider the need for additional services to compensate for the 1993-94 school year in which services were not listed and therefore not necessarily provided. Services identified by the team must then be provided.

On or before July 15, 1994, the district must provide this office with a copy of the newly developed IEP.

## V. RECOMMENDATIONS

It is apparent that both the parents of T.K. and members of the staff are frustrated with ongoing lack of clarity as to what needs to be provided and whose responsibility it is to provide what. Both have made significant attempts to communicate, including participation in mediation. A written Transition Plan which addresses needs, activities, responsibilities and linkages would allow for the documentation of what services will be provided and the responsibilities of the school, parents and others. The process utilized for the transition planning notes appears to be an excellent beginning, from which the team can go on to identify transition services, responsibilities and linkages. Those transition services for which the school is responsible would then become a part of the IEP. It is recommended that the district, if unfamiliar with transition plans, request inservice training on this topic.

Dated this 27th day of May, 1994

Carol Amon

Carol Amon, Federal Complaints Investigator

**Case Number: 94:507**

**Status:** Complaint Findings

**Key Topics:** Free Appropriate Public Education (FAPE)
Least Restrictive Environment (Continuum of Placements)

**Issues:**

- Whether or not the district failed to provide a free appropriate public education by not providing a continuum of services to this student and all other students with similar disabilities
- Whether or not the Special Education Services Unit (SESU) of the Colorado Department of Education failed to ensure that the district provides a continuum of services.

**Decision:**

- As shown by the district's comprehensive plan and the onsite by the SESU, a continuum of services has been provided by the district.
- The district must indicate on the IEP the amount of special education services to be provided and the extent that the student will be educated in the regular education program.

**Discussion:**

- Placement options available for providing special education and related services.
- Student was receiving home schooling at the time complaint was filed.

**FEDERAL COMPLAINT NUMBER 94.507**
**(OSERS Complaint Number CO:93-239)**

**FINDINGS AND RECOMMENDATIONS**

## I. PRELIMINARY MATTERS

A. The complaint filed with the United States Department of Education, Office of Special Education and Rehabilitative Services ("OSERS") was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on March 28, 1994.

B. The complaint was filed by L.C.J. S. on behalf of his son, W.S. and all students within the district with similar disabilities, against the Academy School District 20 ("the district") and the Special Education Services Unit ("SESU") at CDE.

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district and the SESU as recipients of federal funds under the Act. It is undisputed that the district and the SESU are program participants and receive federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. The district is an administrative unit which is a public agency monitored by the SESU as it relates to the Act.

F. The Office of Federal Complaints is part of CDE's Commissioner/Deputy Commissioner Office, separate and independent from the Office of Special Services of which the SESU is a part. SESU exercises no supervisory authority over the investigation of this complaint.

G. W.S. was a student with disabilities eligible for services from the district under the Act during the 1992-93 school year; however he withdrew from the district on 8/19/93 in order to participate in home schooling.

H. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

I. The timeline within which to investigate and resolve this matter expires on May 27, 1994.

J. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint, a review of records and data on file with CDE, and consideration of relevant case law and federal agency opinion letters

## II. FIRST ISSUE

A. STATEMENT OF ISSUE:

Whether or not the district has violated the provisions of the Act by:

- failing to provide a continuum of alternative placements for W. S. and all other students with similar disabilities and
- failing to provide a free appropriate public education to W. S. specifically by not providing an appropriate placement to meet his needs as identified on the IEP.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) and (20), and 1414

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346, 300.550, 300.551, 300.552, 300.553

Fiscal Years 1992-94 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education in the least restrictive environment to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child. In carrying out its responsibilities, the district identified W.S. as an eligible student with disabilities. A triennial review was held on 2/24/93 with speech/language and social/ emotional disabilities identified as the handicapping conditions (now termed disabling conditions).

4. A range of placement options for providing special education and related services, known as a "continuum of alternative placements", must be available to meet the needs of children with disabilities. Such alternative placements include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. These alternative placements must be available to the extent necessary to implement the IEP for each child with a disability.

5. L.C.J.S. states, "District 20...does not offer a continuum of special education placements. Specifically District 20 offers no categorical self-contained placement for students diagnosed with 'mild/moderate' handicapping conditions such as attention deficit hyperactivity disorder (ADHD) or other similarly handicapping conditions.

6. The district's response to this complaint states, "The district does, in fact, provide a continuum of alternative placements for students as stated in the local comprehensive plan, Section III, F., Provision of Services".

7. The district's local comprehensive plan, Section III, F., Provision of Services, which was approved by the SESU, states, "Academy District 20 ensures that appropriate services are provided to all handicapped students, in accordance with their individual educational plans and that a diversified approach shall be utilized within regular school programs to meet individual student needs, maintain effective education in the least restrictive environment, and foster shared responsibility between general and special educators, support staff and parents. "

   The district's comprehensive plan lists procedures which are utilized for providing services according to the level of need. Placement alternatives include:

   Services for students with mild/moderate needs are provided within the home school building.

   Services for students with severe needs are provided either within the home school building or in a district center-based school.

   Services for students with profound/substantial needs are provided within the home school building or if justified, in a district center-based school.

8. L.C.J.S. refers to "mild/moderate" as a "handicapping condition" and to "ADHD" as W.S.'s "handicapping condition". The district refers to "mild/moderate" "needs" and to "speech/language disability" and "emotional disability" as W.S.'s "handicapping condition" or disability. The Act does not consider "mild/moderate" nor "ADHD" as handicapping conditions or disabilities. Students with the medical diagnosis of ADHD do not automatically qualify as disabled under the Act or under state regulations.

9. The Administrative Check List which is part of the CDE Comprehensive Onsite Report for Academy District 20, dated February 4-7, 1992, indicates the following:

| Standard | Status |
|---|---|
| All instructional services listed on IEPs are provided | Acceptable |
| Placement/service options include the following instructional services are available to the extent necessary to implement the IEP for each child: | |
| -instruction in regular classes | Acceptable |
| -special classes | Acceptable |
| -special schools | Acceptable |
| -home instruction | Acceptable |
| -instruction in hospitals and institutions | Acceptable |

10. Data reported to CDE as part of the December 1993, 94-142 Student Count indicates that of the total of 210 students with speech/language disorders receiving special education services, the delivery system was: consultant - 4, itinerant - 111, resource - 92, and self-contained - 3. Of the total of 203 students with emotional disability receiving special education services, the delivery system was: consultant - 9, itinerant - 6, resource - 166, self-contained - 20, and private residential - 2. Of the total of 995 students with all disabilities, the delivery system was: consultant - 55, itinerant - 157, resource - 704, self-contained - 77 and private residential - 2.

11. L.C.J.S. states in his complaint, "District 20 chooses instead to 'mainstream' all handicapped students not diagnosed 'severely emotionally disturbed'".

12. Based on the district's local comprehensive plan, the onsite monitoring report and the data collected by CDE, the district does provide alternative placements for students with speech/language disabilities and with emotional disabilities. It also provides alternative placements for students other than those with a severe emotional disability.

13. With regard to the provision of FAPE to W.S.:

    a. The needs identified on W.S.'s IEP, dated 2/24/93 are:

       to develop skills for establishing positive peer relationships and social interaction,
       to strengthen self-monitoring skills for clear speech and behavior,
       to continue to develop strategies for organization,
       behavior modification program,
       modified grade/curriculum,
       to continue to strengthen compensatory skills for written work and
       to develop realistic/accurate perception of how he learns.

    b. The specific special education services identified on W.S.'s IEP, dated 2/24/93 are:

       Behavior Management System (Consultative with Behavior Specialist - Psychologist)
       Speech/Language (Direct/Consultative) - 1:1, small group, etc. by SLP
       Direct Service Language Arts and Math

    c. The placement alternatives considered on W.S.'s IEP, dated 2/24/93 were:

       Home School Building, regular education, consultive special education
       Home School Building, regular education and direct special education.

       The placement chosen by the IEP team appears to be a combination of the above.

14. L.C.J.S. states in his complaint, "The continuum of alternatives placements that could be applicable to my son's situation isn't even made available to him based upon the District's decision simply not to offer it."

15. The district's response to the complaint states, "In W.S.'s IEP meetings, the more restrictive self-contained placement has not been considered due to his ability to gain reasonable benefit from the program and services available in his home school."

16. Based on the needs and specific special education services identified on W.S.'s IEP, dated 2/24/93, the placement alternatives considered appear to be appropriate. Nothing written on the IEP would indicate that the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

17. The amount of special education and related services, however, was not specified on the IEP. There was no indication of the amount of consultation to be provided by the psychologist, the amount of speech/language direct or consultive service to be provided, nor the amount of direct special education service to be provided for language arts and math. There also was no indication of the extent that W.S. would be educated in the regular educational program.

18. The amount of services to be provided must be stated in the IEP, so that the level of the district's commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various special education and related services to be provided must be (1) appropriate to that specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP.

19. The CDE Comprehensive Onsite Report for Academy District 20, dated February 4-7, 1992, states the following in the Executive Summary: "...the district has established a culture of teamwork and integration which includes a strong commitment in every building to collaborative efforts in meeting the needs of students with disabilities...When this culture of teamwork and integration is combined with a site-based management model there is a great opportunity for new solutions to old problems. There are also, however, some hazards. They include: 1) the 'special' part of special education may be lost. The reasons these students initially were identified as handicapped is because they have needs which cannot be met in a regular classroom without supplemental services. Handicapped students continue to need instruction related to their 'deficit' in order to reduce or compensate for the handicapping effects of the deficit..."

D. CONCLUSIONS

1. The district did not violate the provisions of the Act by failing to provide a continuum of alternative placements for W.S. and all other students with similar disabilities.

2. The district did not violate the provisions of the Act which require a free appropriate public education in an appropriate placement to W. S. The district did provide an appropriate placement to meet his needs as identified on the IEP.

3. The district did violate the provisions of the Act which require specifying the amount of special education services to be provided as well as the extent that W.S. would be educated in the regular educational program on the IEP developed for W.S.

E. REMEDIAL ACTION

W.S. may re-enroll in the district at any time, as long as he remains a resident of the district. Should he re-enroll, the district must reconvene an IEP committee to develop a new IEP for him. That IEP must meet all legal requirements including the specification of the amount of each special education and related service and the extent of participation in regular education.

F. RECOMMENDATION

With the district's commitment to teamwork, integration and site based management, it may be important to provide training at the building levels on the necessity of specifying on each IEP, the special education and related services to be provided along with the amount of each service.

## III. SECOND ISSUE

A. STATEMENT OF ISSUE:

Whether or not the SESU has violated the provisions of the Act by:

- failing to ensure that Academy School District 20 provides a continuum of alternative placements listed in the definition of special education (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

- failing to establish and implement procedures to ensure that Academy School District 20 provides special classes, separate schooling or other removal of children with disabilities from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) and (20), and 1414

34 C.F.R. 300.2, 300.121, 300.130, 300.550, 300.551, 300.552, 300.553, 300.556

C. FINDINGS

1. At all times relevant to the complaint, the SESU was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the SESU, in part, based on the assurances contained within the application.

3. The SESU is responsible for ensuring that the requirements of the Act are carried out and that each educational program for children with disabilities administered within the State meets the education standards of the SESU including the requirements of the Act.

4. The SESU must ensure that the district establishes and implements procedures that meet the requirements of the Act, such as:

   - a continuum of alternative placements that is available to meet the needs of children with disabilities including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and

   - providing for special classes, separate schooling or other removal of children with disabilities from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

5. L.C.J.S. states in his complaint, "District 20, operating under the guidance of the Colorado Department of Education, does not offer a continuum of special education placements." He also states, "...the Colorado Department of Education and the State of Colorado have failed to establish procedures in their state plan to assure that 'special classes, separate schooling, or other removal of handicapped children from the regular educational environments occurs...when the nature or severity of the handicap is such

that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily'..." L.C.J.S. left out the word, "only" which significantly changes the meaning of this statement/regulation.

6. According to the SESU's response to the complaint, "The SESU in its monitoring of administrative units requires that a local comprehensive plan be submitted by each administrative unit in order that the units provide in detail how they intend to meet the requirements of the Individuals with Disabilities Education Act (IDEA). Such a plan from School District 20 is on file with the SESU. The plan dated August 1991, was reviewed and approved by SESU staff...Pages 10 through 14 of District 20's Plan, while not identifying each point of the continuum specifically does state that ' an array (continuum) of services is available'".

7. The relevant pages from District 20's Plan, state: "Academy District 20 ensures that handicapped children and youth within its jurisdiction are educated to the maximum extent appropriate in the least restrictive environment...The provision of special classes, programs, separate schooling or other removal of handicapped children and youth from the regular educational environment shall occur only when the nature or severity of the handicap is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily. Academy District 20 further ensures that: ...4. An array (continuum) of services is available to meet the needs. 5. Unless a handicapped child's IEP requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped. If she/he cannot attend home school, the educational placement is as close as possible to the child's home. Documentation of the rationale for removal from home school must be supplied."

8. The SESU's response to the complaint also adds, "The monitoring of administrative units in addition to a review of their local comprehensive plans is carried out through a system of onsite visits. School District 20 was visited in February of 1992 and the onsite team found that practices within the District were consistent with its approved local plan.

9. The Administrative Check List which is part of the CDE Comprehensive Onsite Report for Academy District 20, dated February 4-7, 1992, indicates the following:

| Standard | Status |
|---|---|
| All instructional services listed on IEPs are provided | Acceptable |
| Placement/service options include the following instructional services are available to the extent necessary to implement the IEP for each child: | |
| -instruction in regular classes | Acceptable |
| -special classes | Acceptable |
| -special schools | Acceptable |
| -home instruction | Acceptable |
| -instruction in hospitals and institutions | Acceptable |

10. Data reported to CDE as part of the December 1993, 94-142 Student Count indicates that of the total of 210 students with speech/language disorders receiving special education services, the delivery system was: consultant - 4, itinerant - 111, resource - 92, and self-contained - 3. Of the total of 203 students with emotional disability receiving special education services, the delivery system was: consultant - 9, itinerant

- 6, resource - 166, self-contained - 20, and private residential - 2. Of the total of 995 students with all disabilities, the delivery system was: consultant - 55, itinerant - 157, resource - 704, self-contained - 77 and private residential - 2.

11. The administrative checklist which is part of that monitoring report lists:

| Standard | Status |
|---|---|
| Special classes, separate schooling or other removal of students with disabilities from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. | Acceptable |

D. CONCLUSIONS

1. The SESU has not violated the provisions of the Act by failing to ensure that Academy School District 20 provides a continuum of alternative placements listed in the definition of special education.

2. The SESU has not violated the provisions of the Act by failing to establish and implement procedures to ensure that Academy School District 20 provides special classes, separate schooling or other removal of children with disabilities from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

E. REMEDIAL ACTIONS

None

F. RECOMMENDATIONS

None

Dated this 27th day of May, 1994

Carol Amon

Carol Amon, Federal Complaints Investigator

Cheryl Karstaedt

Cheryl Karstaedt, Federal Complaints Coordinator

**Case Number: 94:508**

**Status:** Complaint Findings

**Key Topics:** Individualized Educational Plan (IEP)
Transitional Programming
Free Appropriate Public Education (FAPE)

**Issues:**

- Whether or not the Division of Youth Services (DYS) and the district of residence failed to provide a free appropriate public education by not developing a current IEP and transition plan and providing services in accordance with these plans.

**Decision:**

- The DYS failed to include statements on the IEP of the specific special education and related services and the extent to which the student will be able to participate in regular education, and failed to provide some services.

- The district also failed to provide assessment, an IEP and services.

**Discussion:**

- The school districts in which students with disabilities live on a day-to-day basis in the district that is responsible for the student's education.

## FEDERAL COMPLAINT NUMBER 94.508

## FINDINGS AND RECOMMENDATIONS

### I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on April 12, 1994.

B. The complaint was filed by Ms. R.S., on behalf of her son, H.W., against the Colorado Department of Institutions, Division of Youth Services, F. Jerald Adamek, Director, ("DYS"), and Pueblo District 60, Dr. Henry Roman, Superintendent ("the district").

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, the Chapter 1 State Operated or Supported programs for Handicapped Children, Part D Elementary and Secondary Education Act of 1965, 200.SC 2701 et. seq., and its implementing regulations under 34 C.F.R. 302.64 - 302.66, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the DYS as a recipient of federal funds under Chapter 1 and the district as a recipient of federal funds under the Act. It is undisputed that the DYS and the district are program participants and receive federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. H.W. is a student with disabilities eligible for services under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in federally funded programs administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on June 10, 1994.

H. The investigation of the complaint included a review of the documents submitted by the parties, personal and telephone interviews with persons named in those documents or who had information relevant to the complaint, review of interagency agreements, and consideration of relevant case law and federal agency opinion letters.

### I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not DYS and the District have violated the provisions of the Act by failing to provide a free appropriate public education (FAPE) to H. W., specifically by:

- not developing a current individual educational plan (IEP) and accompanying transition plan and
- by not providing special education and related services including transition services to meet his needs in accordance with these plans.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18), (19) and (20); 1412(6), 1413(a), 1414 and 2794

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.18, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346, 302.1, 302.2, 302.4, 302.30, 302.31 and 302.60

Fiscal Years 1992-94 State Plan Under Part B of the Act

C. FINDINGS

DYS and District Responsibility

1. At all times relevant to the complaint, the district was receiving funds under the Act and DYS was receiving funds under ESEA, pursuant to an approved application for funding.

2. The funds were paid to DYS and the district, in part, based on the assurances contained within the applications.

3. One of the assurances made by DYS and the district is that, in accordance with the Act, each will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. H.W. has been determined to be a student with disabilities, specifically visual impairment/blindness and serious emotional disturbance. H.W. is currently serving a two year commitment to DYS, beginning 11/17/92. He was placed at Lathrop Park Youth Camp (LPYC) in Walsenburg on 12/30/92. On 2/11/94 he was transferred to a proctor home placement located in Pueblo School District #60. H. was moved from the proctor home to the Pueblo Youth Services Center, located in Pueblo 60 on 5/24/94. H.W. will complete his commitment to DYS on 11/17/94, and will be 18 years old on 1/13/95. H.W.'s mother, R.S., resides within El Paso School District #11.

5. The Cooperative Agreement between the CDE and the Colorado Department of Institutions (DOI), DYS dated 5/28/87, states:

   [The DOI, DYS] shall assure that each facility of the DOI, DYS shall notify the local administrative unit of residence that an individual from that unit has been committed. Concurrently, the administrative unit of residence will be notified that an assessment has been initiated on the child which may result in a staffing...

   [The DOI, DYS] shall assure that every handicapped individual in secure placement, 5 to 21 years of age, has the benefit of a screening and an assessment culminating in a staffing and the development of an individual education program. "

   They shall assure that the IEP remains in effect until the child is either staffed out of special education or discharged from the DYS and transitioned back into the community.

For students identified as handicapped prior to entering a DYS facility, a staffing must be held within 20 days of commitment to a facility as the incarceration constitutes a change in placement.

Staffing shall be scheduled by the facility at which the student resides. Appropriate designees may attend staffings for the administrative units of residence.

Placements made into the community by DYS shall only be made following prior notification of both the administrative unit of residence and administrative unit of placement.

6. Therefore, DYS has the current responsibility for developing an IEP for H.W. in cooperation with the district of residence.

7. Section 22-20-107.5 C.R.S., prior to 4/14/94, defined the district of residence of a child with a disability as "the school district in which such child lives on a day-to-day basis; except that, when a child is living at one of the regional centers including satellite homes of such centers operated by the department of institutions, the Colorado mental health institute at Pueblo or Fort Logan, a group care facility or home, or the school for the deaf and the blind, such child shall be deemed to reside where the parent or guardian of such child resides".

   Rule 1CCR 301-8 2220-R-2.01(1), effective until 3/15/94 stated "If a child resides at one of the regional centers, residential child care facilities, hospitals, group care facilities or homes, Colorado School for the Deaf and the Blind, Department of Corrections, or in a facility operated by the Division of Youth Services, such child shall be deemed to reside where the parent or the guardian of the child resides".

   Section 22-20-107.5 C.R.S., was amended on 4/14/94, to add to the above exceptions to the general rule, "OR ANY OTHER FACILITY OPERATED BY OR UNDER CONTRACT TO THE DEPARTMENT OF INSTITUTIONS".

8. Unless within one of the statutorily created exceptions, the general rule is that students with disabilities are residents of the districts in which they live on a day-to-day basis. Neither proctor homes nor foster homes are among the statutorily stated exceptions to the general rule. Therefore, students who live in proctor homes or foster homes, whether disabled or not, are residents of the districts in which they reside on a day to day basis. The purpose of Section 22-20-107.5 is to lessen the program responsibility and financial impact on a school district when a sizable residential facility, which may be serving large numbers of special needs students, happens to be located in a particular school district. The statutory exceptions to the general rule allow the educational responsibility for the residential students to be more evenly dispersed throughout the state. Smaller homes, such as foster or proctor homes, were not excluded from the general rule.

9. Therefore the districts of residence for H.W., would have been as follows:

| | |
|---|---|
| 11/17/92 - 2/11/94: | El Paso School District #11 |
| 2/11/94 - 5/24/94: | Pueblo School District No. 60 |
| 5/24/94 - present: | El Paso School District #11 |

   These districts were responsible for working with DYS to develop an IEP for H.W. during the timeframes indicated.

IEP Development (LPYC)

10. Each responsible public agency must ensure that each child with a disability is provided a free appropriate public education which is based on his or her IEP.

11. An IEP must include: a statement of the child's present levels of educational performance, a statement of annual goals including short-term instructional objectives, a statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs, the projected dates for initiation of services and the anticipated duration of the services, and appropriate objective criteria and evaluation procedures and schedules for determining whether the short term instructional objectives are being achieved.

12. The IEP for each student, beginning no later than age 16, must include a statement of the needed transition services including, if appropriate, a statement of each public agency's and each participating agency's responsibilities or linkages, or both, before the student leaves the school setting.

    (a) Transition services means a coordinated set of activities for a student, designed within an outcome-oriented process, that promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.

    (b) The coordinated set of activities must be based on the individual student's needs, taking into account the student's preferences and interests.

    (c) The coordinated set of activities must also include needed activities in the areas of instruction, community experiences, the development of employment and other post-school adult living objectives, and if appropriate, acquisition of daily living skills and functional vocational evaluation.

    (d) If the IEP team determines services/coordinated activities are not needed in any of the above areas (stated in [c]) , the IEP must include a statement to that effect and the basis upon which the determination was made.

13. Prior to the development of an IEP, if medical assessments are needed or recommended, medical services must be provided by a licensed physician for diagnostic purposes to determine a child's medically related disability that may result in the child's need for special education and related services

14. An IEP was developed for H.W. on 1/25/93 by DYS, 26 days after placement into LPYC which is 6 days beyond the 20 days specified in the DYS/CDE interagency agreement. The district of residence was not a part of that IEP meeting. The IEP includes statements of current levels of functioning, needs, disability, goals and short term objectives. The projected dates for initiation of services and the anticipated duration of the services were identified. The goals were:
    - to accept responsibility...
    - to decrease impulsive behavior...
    - to develop an understanding of the effect his delinquent activities have on his victims...
    - to increase basic reading skills...
    - to increase basic math...
    - to increase basic writing skills...

A Continuity of Care Plan (CCP) was developed by the client manager prior to the staffing. Staff within DYS describe the function of this document in relation to the IEP and accompanying transition plan in different ways.

No specific special education and related services were identified nor was the extent that the child will be able to participate in regular educational programs, other than to state persons names after each of the goals, such as "Conder/staff, Young/Tessar, Allierici/Tessar.

No statements of the needed transition services including, if appropriate, a statement of each public agency's and each participating agency's responsibilities or linkages, or both, were included on the IEP.

Provision of Services (LPYC)

15. According to the DYS response, all of the resources available to DYS were utilized in providing special education and related services including transition services to H. DYS provided many examples of consultation and accommodation as well as the provision of specialized materials, however none of these were documented on the IEP.

16. DYS reports, however, indicate the lack of some specific special education and related services. Specifically this included statements of "no 1:1 from specialists", "no one to grade Braille", "no one to help him with division on abacus", and "mobility training has not been initiated due to lack of funds and currently a lack of a provider". Thus, there was limited involvement of special education service providers up to this point

IEP Development (Proctor home)

17. DYS contacted Pueblo District No. 60 on 12/15/93 to notify them of H.W.'s potential placement into a proctor home within the district's jurisdiction. This constituted prior notification of the administrative unit that placement into the community would be made, as required by the Cooperative Agreement.

18. An IEP for H.W. was developed by Pueblo School District No. 60 on 1/21/94, but was not completed until 4/25/94. It states:

"Dist. #60 is being considered for his schooling as he might be placed for living situation in Pueblo.

Possible program at Centennial: 2 hrs. V.H. Lab. SED/EH resource classroom after transition planning conference held prior to placement into SED?EH lab. Susan Omlid of Dept. of Institutions will have H. evaluated by school of Deaf & Blind for Triennial Evaluation prior to placement in District # 60. Placement contingent in Dist. # 60 upon excess costs being paid by Home Dist. Susan to refer to Voc. Rehab..

A consent for placement in special education programs or services, dated 1/21/9l4 and signed by R.S., the mother, and District 60's Director Designee, states: Placement: SED/VH 2 Hs. daily per wk. school days. V.H. 2 hrs. daily. Placement Dependent upon Home Dist. paying Excess Costs. Until level of trust with other school personnel is established he will not attend school when V.H. teacher Ruth Giordano is not present.

Provision of Services (Proctor Home)

19. According to District 60's response to the complaint, "Taylor Young, Colorado Springs, District 11, has indicated to Mr. Quintana that District 11 will not authorize excess costs because H.W. is under the jurisdiction of the Department of Institutions, Division of Youth Services.

20. Since Pueblo District 60 would be the district of residence for H.W. upon residing in a proctor home within its jurisdiction, the provision of services by Pueblo 60 could not be dependent up El Paso #11 agreeing to pay excess costs.

21. According to the complaint response by Pueblo District 60, they were notified on 3/11/94 that H.W. had been placed in a proctor home in Pueblo, which was on 2/11/94. A DYS staff member indicated that notification was 30 days late due to the lack of communication as to when assessment was completed at CSDB. There were various other perceptions relating to this issue, however, a planning conference was held by Pueblo School District No. 60 on 4/25/94 as a follow-up to the staffing held on 1/21/94. The report states:

    "H. has been diagnosed as oppositional defiant disorder as well as depression. It is Ms. Douglas' belief that H.'s behavior at times is bizarre and that he is unable to control behavior at all times. A concern for the safety of H. as well as others was expressed by Ms. Douglas. Ms. Douglas believes H. needs a complete psychiatric evaluation and be considered for medication.

    According to H.'s proctor parents, H. has many compulsive behaviors which have made it difficult for H. to adjust. H. has many behaviors that make it imperative that he receive assistance prior to enrolling in a public school setting. ...the proctor parent, doesn't believe H. is ready to attend public school.

    Due to the nature of H.'s psychiatric needs it is the staffing committees' opinion District # 60 is not equipped to meet his needs at this time. The Division of Youth Services will explore an alternative setting to meet his needs in coordination with the courts H.'s family and Colo. Dept. of Education. "

22. According to Pueblo 60's response to the complaint, "Pueblo District No. 60 feels that we would be jeopardizing H.W.'s safety and the safety of other students and teachers if we were to attempt to provide services to him in one of our schools.

23. The staffing/IEP committee did not review the new assessment information from CSDB, except for a cover letter from the CSDB psychologist. The committee did not determine present levels of functioning, needs, disability, goals, objectives and specific special education and related services to be provided. The team used one letter as the sole criterion for determining that Pueblo 60 could provide no appropriate educational program for H.W. Since H.W. was within Pueblo 60's jurisdiction, the district had the legal obligation in cooperation with DYS of finding an appropriate educational program for H.W.

24. According to the DYS response to the complaint, "During the transition to this proctor home, activities and transitional services were provided H. 2 - 3 hours a day, 5 days a week, at Pueblo Youth Services Bureau." According to a case summary prepared by Suzann Omlid, during the transition "H.'s program still lacks education - but he is

involved in the groups that are provided at PYSB on a variety of topics and this increases his socialization. In addition, he is being seen ...to deal with anger issues."

25. H.W. was transferred out of the proctor home and into the Pueblo Youth Services Bureau on 5/24/914 due to non-compliance with the program. H.W. was then voluntarily transferred to the adolescent treatment unit at Parkview hospital in order to explore and determine the need for medication.

## III. CONCLUSIONS

1. Upon placement at LPYC, DYS developed an IEP six days past the 20 day timeline within which to develop an IEP for H.W. This is not a significant delay and therefore DYS substantially complied with the provisions of the Act.

2. DYS did violate the provisions of the Act by not developing an IEP which includes all components required by statute or regulation; specifically, a statement of the specific special education and related services to be provided and the extent that the child will be able to participate in regular educational programs were lacking. Although some transition services were detailed in the Continuity of Care Plan, this also did not meet the requirements of the development of a transition plan and the provision of transition services as part of the IEP.

3. Although DYS provided some educational services to H.W. while at LPYC, it did violate the provisions of the Act by not providing specific special education and related services, including transition services because these were not detailed, as required, on an IEP. By DYS's own admission, no one was available to grade Braille, help with division on the abacus and provide mobility training. If needed, these were to be the special education components of the IEP. It is not clear whether DYS contacted the district of residence for assistance in the provision of these services.

4. DYS did not violate the provisions of the Act by failing to notify Pueblo District No. 60 of the potential change of placement of H.W. into a proctor home within it's jurisdiction, however it did violate the Act by changing his placement without timely notification of the District of its need to develop a new IEP and to provide special education and related services in accordance with that IEP.

5. Pueblo District No. 60 did violate the provisions of the Act by failing to provide special education and related services to H.W. by stating that the provision of services was contingent upon excess costs being paid by the home school district. Pueblo District No. 60 was the district of residence while H.W. was in the proctor home from 2/11/94 to 5/24/94.

6. Pueblo District No. 60 did violate the provision of the Act as a result of the IEP meeting on 4/25/95, by: (1) failing to consider all assessment information, (2) failing to determine present levels of functioning, goals, objectives and specific special education and related services, and by (3) utilizing one letter as the sole criterion for determining that they could provide no appropriate educational program for H.W. The District also violated the provisions of the Act by failing to provide an appropriate education for H.W.

## IV. REMEDIAL ACTIONS

1. On or before July 1, 1994, DYS must reconvene an IEP committee with participants to include those required by regulation, as well as representatives from Pueblo District No. 60 (the district of residence from 2/11/94 - 5/24/94) and El Paso District #11 (the current district of residence), to:

   (a) determine what further assessments must be provided to H.W. to resolve the issues related to the need for a complete psychiatric evaluation and the consideration of use of medication. That assessment(s) must then be obtained as quickly as possible. The team may request the use of difficult to assess funding from CDE, to assist with this.

   (b) determine special education and related services including transition serives which should be provided by DYS to compensate for services not provided from 11/17/93 to 2/11/94.

   (c) determine services which should be provided by Pueblo District No. 60 to compensate for services not provided from 2/11/94 through 5/24/94.

   (d) El Paso District #11 and DYS must develop a current IEP. Compensatory services from Pueblo 60 and DYS must be in addition to this. After assessment is completed, the IEP committee must reconvene to make any necessary changes in the current IEP and to develop a new IEP as stated in Corrective Action number 3.

2. Pueblo School District No. 60 must provide special education and related services to H.W. beginning no later than 7/11/94 and terminating on 11/17/94 or earlier if H.W. is moved out of the physical boundaries of the district or if a new IEP is developed and service plan begun as a result of Corrective Actions numbers 1 (a) and 3.

3. On or before 8/15/94, DYS and El Paso District #11 must jointly schedule an IEP meeting for H.W. to determine an appropriate individual education plan and placement which will provide him with an appropriate education during the 1994- 95 school year. The IEP committee must consider the results of any recent medical and other related assessments. The IEP must include a transition plan and transition services. It must also include a transition plan to be in place when H.W. leaves DYS.

4. DYS and Pueblo District No. 60 must inform this office of the results of all of the above within 15 days of the occurrence.

Dated this 9th day of June, 1994

Carol Amon

Carol Amon, Federal Complaints Investigator

**Case Number: 94:509**

**Status:** Complaint Findings

**Key Topics:** Procedural Safeguards (Notice, Parent Involvement)
Related Services

**Issues:**

- Whether the district failed to obtain parental consent for special education services.
- Whether the district failed to provide written notice to parent of IEP meetings.
- Whether the district failed to provide training in the use of mobility aids.

**Decision:**

- The district did obtain parental consent before placement.
- The district did provide written notice to parent of IEP meetings.
- The district offered to provide training in the use of mobility aids, but student was not in attendance at school to receive training.

**Discussion:**

- Parent request to provide instruction and training in place of physical therapist.

## FEDERAL COMPLAINT NUMBER 94.509

## FINDINGS AND RECOMMENDATIONS

### I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on April 19, 1994.

B. The complaint was filed by Ms. L. V. S. on behalf of her daughter, V.S., against the Arapahoe School District 6, Littleton ("the district"), Dr. James Weatherill, Acting Superintendent and Ms. Elaine Worrell, Director of Special Education.

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. V. S. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over some of the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. Part of the complaint alleging discrimination was not accepted for investigation. Section 504 of the Rehabilitation Act which prohibits discrimination against persons with disabilities in educational programs is enforced in the school districts by the U.S. Office of Civil Rights of the United States Department of Education, not by CDE. In addition, the complaint referred to a violation of the Act's implementing regulation 34 C.F.R. 300.301(a), however, no grounds were presented to substantiate this.

H. The timeline within which to investigate and resolve this matter expires on June 17, 1994.

I. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint, and consideration of relevant case law and federal agency opinion letters.

## I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act,

- by allegedly
  (1) failing to obtain parental consent before placement of V.S. into a program providing special education and related services or
  (2) failing to provide written notice when proposing or refusing to initiate or change the educational placement, whichever is applicable,

- by allegedly failing to provide training in the use of a scooter at public expense, under public supervision and direction, and without charge, and

- by allegedly failing to ensure that one or both of the parents of V.S. were present at the IEP meetings on 10/8/93, 2/1/94, 3/16/94 and 3/23/94 (which resulted in the development of an IEP to be implemented on 4/13/94) or were afforded the opportunity to participate.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) and (20), and 1414

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.344, 300.345, 300.500, 300.504

Fiscal Years 1992-94 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. V.S. was identified as a student with disabilities by the Colorado Springs Public Schools prior to entering Littleton Schools in 11/93 as a direct placement as a transfer student.

5. Parental consent must be obtained before conducting a preplacement evaluation and before initial placement of a child with a disability into a special education program. After initial consent has been provided, written notice must be given to the parents of a child with a disability a reasonable time before the district proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of free appropriate public education (FAPE) to the child.

6. Ms. L.S. alleges in her complaint, that the staff of Lewis Ames, 4/13/94, began implementing an IEP for which she had not given permission.

7. District records indicate that a Consent for Placement in Special Education Programs or Services in Littleton Public Schools was signed by L. S., parent, on 11/3/93. Placement was into a Resource program at Lewis Ames Elementary.

8. After receiving records from her previous school, the district began the development of a new IEP. Meetings were held on 2/23/93 and 3/2/93.

9. District records indicate that an appropriate Notice of Staffing, signed by Bonnie Brown, Principal, was sent to Ms. L.S. on 2/11/93.

10. The IEP developed on 2/23/93 and continued on 3/2/93 was signed by L. S., parent, on both of these dates under "Persons Attending the I.E.P. Staffing."

11. Consent for Placement in Special Education Programs or Services, Specifically Placement into "Resource with support services by OT (Program) at Ames Elementary School (Location) was signed by L.S. on 3/2/93.

12. A Notice of IEP Annual Review to be held 10/8/93, signed by Bonnie Brown, was sent to Ms. L.S. on 9/23/93.

13. At the Annual Review held on 10/8/93, there was significant difference in opinion between the Ames school staff and Ms. L.S. regarding the use and safety of V.'s walker and wheelchair. The school requested direction from V.'s physical therapist and was willing to pay the fee of the private physical therapist to come to Ames for information and consultation. Ms. L.S. rejected this, saying she preferred that the staff accepted instruction from herself, not the physical therapist.

14. The District has noted a large number of communications between Ms. L.S. and school staff relative to the issue of ambulatory needs, specifically relating to the use of crutches, a 2 wheeled walker, a 4 wheeled walker, a scooter and/or a wheelchair. The school utilized Lou Shannon as a physical therapy consultant.

15. A Notice of IEP Review to be held on 2/1/94, signed by Bonnie Brown, was mailed to Ms. L.S. on 1/12/94.

    A Notice of IEP Review to be held on 3/1/94, signed by Bonnie Brown, was mailed to Ms. L.S. on 2/18/94 along with procedural safeguards.

    A Notice of IEP Review to be held on 3/16/94, signed by Bonnie Brown, was mailed to Ms. L.S. on 3/4/94.

16. On 3/23/94, V.S.'s annual review was completed after four separate meetings which began 10/8/93. A letter was sent to Ms. L.S. from Bonnie Brown on 3/25/94 indicating that the new IEP which was finished on 3/23/94 would be implemented ten days from this notification. The letter indicated that, under due process rights, Ms. L.S. could request a due process hearing if she felt this proposed IEP did not provide a free appropriate public education for V. A copy of the IEP and another copy of procedural safeguards was enclosed.

17. The new IEP was developed on 10/8/93, 2/1/l94, 3/16/94 and 3/23/94 . Ms. L.S. signed that she was in attendance at the last three meetings but, according to the district, refused to sign on 10/8. The IEP includes the following:

    23 Needs listed including:
    - access to wheelchair for emergency situations, evacuation drills, illness, fatigue, field trips
    - two-wheeled walker
    - training of staff and V. in use of scooter by qualified professional(s)
    - helmet needed during use of two-wheeled walker and scooter
    - choice by V. regarding piece of equipment (wheelchair or two-wheeled walker) used at recess

    12 Characteristics of Services listed including:
    - wheelchair and two-wheeled walker for functional mobility
    - use of scooter, after training of V. and staff by qualified professionals
    - inservice training with classmates regarding use of helmet with two-wheeled walker and scooter, and V.'s self-esteem

18. The school continued to note a large number of communications and confrontations between Ms. L.S. and school staff relative to the issue of ambulatory needs, specifically relating to the use of crutches, a 2 wheeled walker, a 4 wheeled walker, a scooter and/or a wheelchair. A letter to the district from Ms. L.S. , dated 4/13/94 states, "You do not have my permission to implement this so called IEP for V. which I received in the mail April 4, 1994. Nor do you have my permission to put my daughter in a wheelchair unless it is sent by me, V.'s mother from home. I send her scooter and 4 wheeled walker. Anything else used without my permission is a violation of my and my daughter's and family's constitutional rights." School staff replied to this and other confrontations with, "We are following the IEP."

19. A review of district records indicates that parental permission to place V.S. into special education was obtained on 11/3/93, and that Ms. L.S. participated in every IEP meeting held by the district for V.S. Ms. L.S. did not agree with the IEP finalized on 3/23/94, however, she did not request a due process hearing, a procedural safeguard afforded to her, should she not agree with the decisions of the IEP committee. Written notice was sent to Ms. L.S. ten days prior to the district's proposing to implement the new IEP.

20. An IEP must include a statement of the specific special education and related services to be provided to the child and of the extent that the child will be able to participate in regular educational programs. This would include statements of inservice training to be provided.

21. Ms. L.S. alleges that on 3/23/94 she was told in the IEP meeting that if her daughter was to be allowed to use her scooter, she should use her Medicaid to pay for the training of its use at Children's Hospital.

22. The district acknowledges that the IEP for V.S. states, "needs: training of staff and V. in use of scooter by qualified professional(s) and helmet needed during use of two-wheeled walker and scooter". It also acknowledges Characteristics of Services which state, "use of scooter, after training of V. and staff by qualified professionals and inservice training with classmates regarding use of helmet with two-wheeled [walker] and scooter, and V.'s self-esteem.

23. District attempts to provide training, prior to the completion on the IEP, were not successful. The physical therapist, according to her report, felt that power and mobility training needed to be done at the hospital, not by the parent. Ms. L.S., according to case conference notes, felt she was qualified to provide the training. Notes from the conference on 3/23/94 state, "mother requests training on the scooter at the school. Lou said V. would be more set apart from students and she would lose school time. Mother thinks that the training should be done here, since this team wants the training. Only follow-up would be done at school, according to Lou, due to a specialized course. B. Brown agrees to accept mother's training if Lou observes and checks."

24. The following documentation of events was a part of the school's records:

3/24 Wheelchair and 4 wheeled walker came today
3/25 V. did not come to school today
3/28 (through 4/4)Spring Break
4/5 Date for implementation of new IEP. V. was absent
4/6 not at school, no reason given
4/7 same
4/8 same
4/11 V. not at school today, snowy day
4/12 V. arrived with scooter and new 4 wheel walker. Mom followed bus in car and appeared unexpected when staff was assisting V. from bus. Twelve times Mom yelled "You'd better not put my daughter in a wheelchair or I'll have your behind. You are violating my rights." This all took place in the 5th grade hallway and the Resource Room. Mom came into the office after being in the Resource Room and yelled, "Do not put my daughter in a wheelchair, I don't care what the IEP says. I am her mother and I make the decisions for my family. I will not put up with the inhumane treatment of my daughter. She can use her scooter when she's out on recess."
4/13 V. arrived with scooter and new 4 wheel walker. Ms. L.S. came to school. She went out to the playground because V. was out there, in a wheelchair. Ms. L.S. took the scooter out to V. and moved her from the wheelchair to the scooter. Police were called. An Arapahoe County Sheriff's Department incident report is on file.
4/14 V. absent. "V. home today due to the 'abuse' she received yesterday"
4/15 V. absent
4/18 Ms. L.S. cailed Transportation and stated that V will not be at school until this is settled in court. At approximately noon today, Ms. L.S. came to Ames with V. and A., and withdrew V. from school at Lewis Ames. She stated to Ms. Brown, our Principal, that she would be enrolling V. in a private school until this was settled in court.

25. The district did identify on the IEP, the need for training in the use of a scooter by qualified professionals as part of a free appropriate public education (at public expense, under public supervision and direction and without charge to the parent). District attempts to provide training, prior to the completion on the IEP, were not successful. A complete assessment of V.S.'s ability on the scooter by the contracted physical therapist, Lou Shannon, was not possible since Ms. L.S. did not send the scooter on the scheduled assessment date, 3/22/94. V.S. came to school only three days after the development of the IEP, which would not be sufficient time in which to implement the training. She was subsequently withdrawn on 4/18.

26. The district must take steps to ensure that the parents of the child with a disability are present at each meeting or are afforded the opportunity to participate. This includes notification of the meetings early enough to ensure that they will have the opportunity to attend, scheduling the meetings at a mutually agreed on time and place, indicating the purpose of the meeting. District records indicate notifications were appropriate.

27. The parents are expected to be equal participants along with school personnel, in developing, reviewing, and revising the child's IEP. This is an active role in which the parents (a) participate in the discussion about the child's need for special education and related services, and (b) join with the other participants in deciding what services the district will provide to the child. Ms. L.S. alleges that the staff at Lewis Ames does not view her as an equal participant in the IEP meetings because of her lack of a professional title, namely "physical therapist". In addition to the actual IEP, the district has kept elaborate case conference notes relating to all communication with Ms. L.S. including the IEP meetings. A review of those notes indicates Ms. L.S. was an active participant. The district did insist upon a professional opinion from a physical therapist as to safety and training issues related to V.S.'s ambulatory needs.

## III. CONCLUSIONS

The District did not violate the provisions of the Act by failing to obtain parental consent before placement into special education, nor by failing to provide written notice when proposing to implement a new IEP. Each was well documented.

The district did not violate the provisions of the Act by failing to ensure that Ms. L.S. was present at IEP meetings and that she was afforded the opportunity to participate. Specifically she was present at the four meetings held to develop the IEP which was finalized on 3/23/94 and implemented on 4/13/94.

The District did not violate the provisions of the Act by failing to provide training in the use of a scooter as part of a free appropriate public education, as V.S. was absent for all but 3 days and subsequently withdrawn from the district after the 4/13/94 IEP implementation date. Should V.S. choose to re-enroll in the district, such training by a professional must be provided.

## IV. REMEDIAL ACTIONS

None.

## V. RECOMMENDATIONS

None.

Dated this 16th day of June, 1994

Carol Amon

Carol Amon, Federal Complaints Investigator

**Case Number: 94:510**

**Status:** Complaint Findings

**Key Topics:** Infants and Toddlers and Other Preschool Handicapped

**Issues:**

- Whether or not Developmental Pathways failed to provide the necessary supports and services under Part H and under Chapter 1 ESEA.

**Decision:**

- Technically the supports and services listed on the IFSP were provided, however very little was specified on the IFSP.

**Discussion:**

- The amount of service was not what the parents believed had been decided upon.

**FEDERAL COMPLAINT NUMBER 94.510**

**FINDINGS AND RECOMMENDATIONS**

## I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Investigator, Colorado Department of Education (CDE), on April 21, 1994, from April Block, CDE Part H Coordinator.

B. The complaint was filed by Mr. and Mrs. T. Y., on behalf of their son, M.Y., against Developmental Pathways, Inc. ("D.P."), the community centered board serving Arapahoe County, Douglas County and the City of Aurora, Mr. John E. Meeker, Executive Director.

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 303.510 - 303.512, the Chapter 1 Part D State Operated or Supported Programs for Handicapped Children, Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 et. seq. (ESEA), and its implementing regulations under 34 C.F.R. 302.64 - 302.66, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against D.P. as a recipient of federal funds under Chapter 1, Part D State Operated or Supported Programs for Handicapped Children, ESEA and a participant in Part H of the Act.

E. M.Y. is a student with disabilities eligible for early intervention services under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on June 20, 1994.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint, and consideration of relevant case law and federal agency opinion letters.

## I. ISSUES

A. STATEMENT OF THE ISSUES:

1. Whether or not D. P. has violated the provisions of Part H of the Act, by failing to provide the necessary supports and services M.Y. and his family are entitled to as detailed in the 1/26/94 Individual Family Service Plan (IFSP), specifically by not providing:
   - in-center classes once a week,
   - occupational consults twice a month in February and March, 1994, and
   - speech consults twice a month in February and once a month thereafter.

2. Whether or not D. P. has violated the provisions of ESEA by failing to provide the necessary supports and services to M. Y. and his family.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1471 through 1484, 20 U.S.C. 2792 and 2794

34 C.F.R. 302.30, 302.32, 302.51, 302.55, 302.60, 302.63, 303.1, 303.3, 303.12, 303.13, 303.14, 303.20, 303.340 through 303.346

Fiscal Years 1992-94 State Plan Under Part H of the Act

C. FINDINGS

1. At all times relevant to the complaint, D.P. was receiving funds under ESEA pursuant to an approved application for funding.

2. The funds were paid to D.P., in part, based on the assurances contained within the application.

3. As a program participant, D.P. assures that all infants and toddlers participating in its program receive early intervention services. As part of the program narrative to support its application for funds, D.P. listed as a program objective "to provide speech and O.T. consultation to parents as requested".

4. M.Y. was identified as a child with disabilities eligible for Part H and D. P. services, on an IFSP developed by Cherry Creek School District No. 5 on 7/1/92.

5. The IFSP developed on 7/1/92 was updated on 10/20/93 by D.P.. The following was listed under "What to do next:
   - continue to improve his muscle tone - physical therapy.
   - occupational, physical, and speech therapies.
   - increase his social stimulation.
   - music therapy and play activities.
   - T. will check with his employer regarding medical coverage regarding therapy services for M. " (added: not available for Down Syndrome children)

6. Another IFSP Progress Review was held on 1/27/94. The Placement Recommendations stated, "continue as follows:

   - M. will continue with the D.P. in - center class once a week;
   - OT - 2 X mo for Feb. & March then reevaluate the end of March;
   - Speech - 2 X Feb (3rd, 17th) and then 1 X mo starting in March;
   - Gymboree - thru March 1 X wk paid by D. P.;
   - continue to receive services thru the summer.
   - Updated information (D.P. therapists) is needed in April so CCCF will know what other assessments may be needed. The CCCF assessment is scheduled for 4/14 @ 1:00.
   - The written information from D.P. therapists has been helpful.

7. Another document dated 1/26/93 (corrected to 94) on D.P. letterhead states the following as the latest IFSP:

   M. will continue to attend the "in center" class at D. P. on Tuesdays at 1:30 p.m. as long as the parents so choose.

Joyce Machala, M.Ed., O.T.R. has recommended that M. and his parent/parents see her 2x's/month for the months of February and March. Scheduled dates for February are 2/3/94 and 2/17/94, March dates have yet to be scheduled. Home Program Ideas are attached.

Carol Laycob, M.A., C.C.C. will see Mark 2 x's in the month of February. Her recommendations for future consults is 1 X/month beginning in March. Home Program Ideas are attached.

Two different sessions of classes at Gymboree have been funded through the E.I. Program. Any future requests will be considered at that time.

ML. will receive E.I. Services through the summer months.

8. Neither of the above documents specified the amount of time for classes and/or consultation. In their complaint, Mr. and Mrs. Y. stated, "Even though duration of therapy consults was not specified in the IFSP, we feel any reasonable person would expect at least a 30 minute session and probably an hour consultation".

9. In addition to information in the complaint, Mr. and Mrs. Y. submitted a personal journal of the process of getting therapy for M. D.P., as part of its response to the complaint, submitted contact data information for M.Y. from 1/27/94 through 3/31/94. The services which were to be offered according to the IFSP, followed by the D.P. response, then the notes from Mr. and Mrs. Y.'s complaint or journal (in parenthesis) are as follows:

<u>In - center class</u>

| | |
|---|---|
| 2/1/94 | Absent |
| 2/8/94 | Absent |
| 2/15/94 | Absent |
| 2/22/94 | Present |
| 3/1/94 | Absent |
| 3/8/94 | Absent |
| 3/15/94 | Present |
| 3/22/94 | Absent |
| 3/29/94 | Absent |

<u>Occupational Consults</u>

| | |
|---|---|
| 2/3/94 | Occupational Therapy Consult |
| 2/17/94 | Occupational Therapy Consult: Ginny checked with T. regarding opportunity to go to Evening with Bev Bos [Paid by DP] |
| 3/3/94 | Occupational Therapy Consult |
| 3/24/94 | Occupational Therapy Consult (M. had his second O.T. of the month and the therapists talked to T. and said there would be 2 O.T. sessions in April and then only 1 per month beginning in May) |

<u>Speech Consults</u>

| | |
|---|---|
| 2/3/94 | Speech Consult (one 10 minute consult) |
| 2/17/94 | (one no show) |
| 3/3/94 | Speech Consult (one 10 minute consult) |
| 3/24/94 | Speech Consult |

## III. CONCLUSIONS

As a private provider receiving funds under Chapter 1, and participating in Part H to serve infants and toddlers with disabilities, D.P. was obligated to carry out the terms of the IFSP developed for M.Y. Pursuant to regulation, each participant who has a direct role in the provision of early intervention services is responsible for making a good faith effort to assist each eligible child and family in achieving the outcomes of the IFSP. Part H differs from Part B of the Act, in that it is more flexible and requires less specificity on the service plan. However this flexibility makes it difficult to find a specific regulatory or legal violation.

Technically, D.P. has provided the supports and services M.Y. and his family were to receive as detailed on the IFSP and, therefore, has not violated the provisions of the Act. Realistically, these supports and services were difficult to access and the amount of service was not what the parent had understood would be provided.

## IV. REMEDIAL ACTIONS

None.

## V. RECOMMENDATIONS

While there are no requirements for the IFSP to be more specific, it should reflect a mutual understanding of the appropriate amount of services to be provided. Clearly, this understanding was not reached in this case. For M.Y., CDE cannot suggest what an appropriate amount of service might be, as this must be agreed to by the parties. It is therefore suggested that D.P. and Mr. and Mrs. Y. agree to mediation to resolve this issue as well as other issues of communication and responsibility which the evidence suggests continue to be matters of dispute between the parties. CDE would provide and pay for a trained mediator upon request.

Dated this 16th day of June, 1994

Carol Amon, Federal Complaints Investigator

Cheryl Karstaedt, Federal Complaints Coordinator

**Case Number: 94:511**

**Status:** Complaint Findings

**Key Topics:** Transitional Programming
Procedural Safeguards (Notice)
Confidentiality of Information

**Issues:**

- Whether the district provided transition services, modifications and counseling services as listed on the IEP.
- Whether the district provided notice to parents of their rights.

**Decision:**

- The district provided needed transition services, modifications and counseling as listed on the IEP.
- Parents were provided with a written list of parental rights and written notification of IEP meetings.

**Discussion:**

- Teacher's personal files are not educational records to which parents have access rights.

**FEDERAL COMPLAINT NUMBER 94.511**

**FINDINGS AND RECOMMENDATIONS**

## I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on May 17, 1994.

B. The complaint was filed by Ms. J.D. on behalf of her son, R.D., against the Thompson R2-J School District ("the district"), Mr. F. Donald Saul, Superintendent, Mr. Douglas Householder, Director of Special Education and Mr. Jack Wilson, Principal.

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. R.D. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over some of the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. Part of the complaint alleging discrimination was not accepted for investigation. Section 504 of the Rehabilitation Act and the Americans with Disabilities Act which prohibit discrimination against persons with disabilities in educational programs are enforced in the school districts by the U.S. Office of Civil Rights of the United States Department of Education, not by CDE. Further, teacher employment and assignment issues are ones within the purview of the district, not CDE.

H. The timeline within which to investigate and resolve this matter expires on July 15, 1994.

I. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint, and consideration of relevant case law and federal agency opinion letters.

## I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act, by allegedly failing to:

- provide a statement of the needed transition services as part of the Individual Education Plan ("IEP"),
- provide the modifications listed on the IEP,
- provide counseling services by qualified personnel, and
- provide information on rights and due process procedures.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18), (19) and (20), and 1414

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.15, 300.16, 300.17, 300.18, 300.121, 300.130, 300.180, 300.235, 300.237, 300.300, 300.340, 300.343 and 300.346

Fiscal Years 1992-94 and 1995-97 State Plans Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. R.D. was identified as a student with disabilities in Arizona, prior to transferring to the Thompson R2-J School District in January of 1993. An IEP was developed for R.D., who was 15 years old at the time, on 1/22/93. That IEP identified R.D. as a student with disabilities.

5. Ms. J.D., in her complaint, alleges that the district did not provide the necessary transition services to R.D., specifically vocational testing, assistance from S. Moore (the transition specialist) with English and Modern History, and the acceptance of R.D.'s working for credit toward graduation. According to correspondence received from Ms. B. Davies, a parent advocate, R.D. did not have a transition plan as part of the IEP.

   a. A review of district records indicates that R.D. did have an IEP and accompanying Transition Plan, dated 1/22/93. The IEP and the transition plan contain specific statements regarding goals, objectives and responsibilities related to transition. The IEP states that "R.D. will increase career awareness" as an annual goal. One

objective is that "R.D. will complete career inventory (vocational assessment)" with the transition plan indicating this would be completed by the junior year. Another statement is that "R.D. will describe at least two areas of career interest and identify steps to develop the background to achieve these goals". The IEP indicates that 6-8 hours per week of resource and/or consult/collaboration services would be provided to R.D. to assist with these goals and objectives.

b. District records indicate that other transition activities occurred. A work preference inventory (PIC) was completed by R.D. on 11/9/93 and reviewed on 11/16/93 as indicated by R.D.'s signature. Also a student vocational interview was completed on 5/9/94, a test of aptitude and interest was completed by R.D. on 5/10/94.

c. Individualized Written Vocational Plans were developed for R.D. for the period of 8/93 - 6/94. These Plans and subsequent Alternative Cooperative Education Program ("ACE") Training Agreements were approved by J.D. and R.D. The Training Agreements which outline responsibilities of the student, the employer, the teacher/coordinator and the parent were also signed by S. Moore on 9/16/93 and 11/16/93. During the school year, instruction and community experiences regarding independent living and personal management were provided through the ACE class. R.D. was employed as part of work experience study. According to the district, participation in the ACE program was to provide the opportunity for vocational instruction and class credits for R.D.'s employment. If the student fulfills a minimum number of hours in employment, as well as the academic portion of the ACE program, academic credit is given for the employment.

d. R.D.'s IEP, dated 1/24/94 lists the following progress toward goals: "R.D. has demonstrated the ability to write a letter to an employer thanking him for an interview....." and "R.D. has explored 2 areas of career interest and is currently working part-time with satisfactory results." The IEP states: "Continue Work Study and on the job training (OJT)." The IEP also indicates that, according to Ms. J.D., R.D. is working and comes home regularly and that he has a good OJT evaluation.

e. New goals and objectives were developed for R.D. and are listed on the IEP dated 1/24/94. They include: "R.D. will participate in vocational testing at FRCC with district vocational assessor" and "R.D. will research the requirements needed to achieve a career option". Services to be provided are Work Study - 5 hours per week and OJT - 15 hours per week.

f. Vocational testing was performed by an employee of Front Range Community College in May.

g. It is clear that district records document that a transition plan was developed and services, including vocational testing, employment and on the job training, were provided.

6. Ms. J.D., in her complaint, alleges that the district did not provide the modifications listed on the IEP. Specifically, she alleges that the teacher refused to do the modifications on 4/18/94, that B. Engle refused to have R.D. in her class to do make up work at home and get credit for English and Modern History. There are no additional facts to support these allegations, and a review of district records reveals the following:

a. R.D.'s IEP, dated 1/22/93, lists the following modifications: preferential seating for peer interaction, additional positive reinforcement, modification of reading assignments (adapted reading level when needed and tape summary of reading material), modified math assignments (allow use of calculator, shorten length, division of assignment into steps), modified written assignments (extra help for written language - individual/small group instruction and non evaluation of grammar, spelling, punctuation and handwriting errors), extra support in comprehension of reading in content classes, provision of study questions for exams, modification of tests as needed, and reduced number of options on multiple choice questions.

b. District documents indicate the following modifications were provided: The English class to which R.D. was assigned had a lower student/teacher ratio than other classes and the support of at least one paraprofessional. The teacher, B. Engle, permitted students to complete reading and writing assignments at a pace consistent with their needs, read aloud more difficult material assigned, reviewed test materials to make them readily understandable, emphasized material that would be included in tests and reviewed homework with students. District documents indicate, however that R.D. began to refuse assistance from the paraprofessional.

c. District records indicate that the staffing/IEP team responsible for R.D.'s education met on 1/25/94 to conduct an annual review of his educational program. They also indicate that B. Engle, in preparation for that staffing/IEP meeting, stated that R.D.'s general attitude was sometimes negative, that tardiness was a big problem, than R.D. came in half way through a block, that he appeared to have an "I don't care" attitude, and that he was close to failing in English and already failing miserably in history.

d. According to correspondence received from B. Davies, a parent advocate for J.D., R.D. had been "kicked out" of the special education resource class for over 20 days prior to 4/18/94, with no notification being given to Ms. J.D. She states that she was told that R.D. had been kicked out of S. Moore's class because R.D. had threatened to kill S. Moore. She also indicates that B. Engle refused to implement the previous IEP. However, no evidence was provided to support these allegations.

e. According to the district, R.D.'s absences from school increased significantly during the second semester and he was frequently late to classes. According to the district, S. Moore did not refuse to have R.D. in her class, but rather his non attendance and incomplete assignments, despite the support provided, resulted in a failure to meet the requirements of the program. S. Moore arranged for R.D. to do a take home final, but he did not turn in the exam. A staffing/IEP meeting was subsequently scheduled for 4/14/94 and changed to 4/18/94 at parental request. Records from that IEP meeting, at which J.D. and R.D. were present, indicate that R.D. was failing English and Modern American History because of non-attendance. At that time, the team determined it would be appropriate to have R.D. make up incomplete work from the third quarter, working with S. Moore and assisted by paraprofessional help which was available every school day.

f. As problems were noted, the district appropriately convened another staffing/IEP meeting on 4/26/94. The meeting of the staffing/IEP team was held due to the unsuccessful plan for permitting R.D. to make up third quarter work. District records of that meeting at which J.D. and R.D. were present, indicate that R.D. would be dropped from English and Modern American History on 5/2/94 and that R.D. would then work on an individualized program through self-paced computer assignments in these subjects under the supervision of N. Arndt. District documents

indicate that once again, however. R.D. demonstrated poor attendance. On approximately 5/17/94, Ms. J.D. indicated to N. Arndt that R.D. would not be coming back to school.

g. The district has documentation that it did provide the modifications listed on the IEP. When R.D. was not successful, even with modifications, the district appropriately reconvened the staffing/IEP committee to develop a new plan. There is no documentation nor evidence provided which indicates that R.D. was suspended from any classes.

7. Ms. J.D., in her complaint, alleges that the district did not provide counseling services by qualified personnel. Specifically, she alleges that teachers and counselors in the special education program at Loveland High are not doing their jobs or are not qualified to do the job, particularly M. Keller who acted in the capacity of a counselor and psychologist rather than a teacher.

a. R.D.'s IEP dated 1/22/93 states that a "peer support group" is the characteristic of service to meet R.D.'s needs to increase social interaction and improve self concept. None of R.D.'s IEPs prescribed the provision of psychological or social work services, nor did any of the IEPs state that counseling was to be provided as a related service.

b. R.D. was given an opportunity to participate in a support group. According to the district, R.D.'s primary special education service providers (M. Keller and N. Meredith suggested that R.D. might benefit from participating in the POPS program, which provides an opportunity for peer group discussions on current issues of concern. Open to all students, including those who have been identified as having disabilities, the POPS classes were facilitated by M. Keller and N. Meredith The POPs program did not involve the provision of counseling services, but rather was a class in which students discussed issues of interest to their peer group. Although issues discussed may have been controversial (such as teen pregnancy, conflict with peers and teen violence), the discussions were general and did not focus on the circumstances of individual students. According to the district, the teachers are trained to facilitate the group discussions, but do not provide counseling or psychological services. There is no evidence that R.D. was to receive counseling services nor that he did receive them.

8. Ms. J.D., in her complaint, alleges that she was never told about her rights or resource options and that she was not provided copies of specific information in her son's educational record. Specifically she requested copies of M. Keller's personal files.

a. District records indicate that Ms. J.D. was provided with a form to grant permission for special education evaluation of R.D. which she signed on 1/5/93. On the back of that form was a listing of procedural safeguards indicating parental rights. Mr. and Mrs. D. were also provided written notifications of staffings as follows: 1/11/93 for 1/22/93, 12/13/93 for 1/24/94, 4/1/94 for 4/14/94, 4/20/94 for 5/2/94. Each of these notifications had, on the back, a listing of procedural safeguards indicating parental rights.

b. According to the district, staff members are instructed to inform parents of their procedural rights and provide the opportunity for parents to ask questions regarding those rights during staffing/IEP meetings.

c. Also, according to the district, R.D.'s parents were provided a packet describing procedural rights upon transferring into the district.

d. Teacher's personal files are not educational records to which parents have access rights, and there was no evidence that J.D. requested anything other than this.

## III. CONCLUSIONS

Clearly there is a significant communication breakdown between the complainant and district staff with each having very different versions and perceptions of what has occurred relative to the education of R.D. Based upon a review of all documentation, however, the district did not violate the provisions of the Act by failing to provide a statement of the needed transition services as part of the IEP, the modifications listed on the IEP, counseling services by qualified personnel or information on rights and due process procedures. When issues arose or the current educational plan was not working for R.D., the district appropriately reconvened the staffing/IEP team in an effort to deal with the identified issues and to develop another plan.

## IV. REMEDIAL ACTIONS

None.

## V. RECOMMENDATIONS

The district has indicated that R.D. has enrolled in the Industrial Technology class at Front Range Community College for the fall of 1995 in a program established by agreement between the district and the community college. This occurred after R.D. visited Front Range and determined that he was interested in the auto mechanic program. With the assistance of Bill Besser, a district transition specialist, R.D. completed the application process.

It is recommended that R.D., his family and district staff members continue to work together in a positive manner relating to this. A conference will be scheduled at the beginning of the school year for R.D.'s service providers from the district and Front Range staff to design a program to meet R.D.'s individual needs. Also, the district has indicated its intent to convene the staffing/IEP team at the beginning of the year to discuss whether a complete reevaluation should be conducted in light of the difficulties R.D. manifested last spring. It is recommended that J.D. and R.D. actively participate in that meeting. Should communication break down, the district may request the services of a contracted impartial mediator supplied by CDE, to assist in the development of mutually agreeable solutions for R.D.

Dated this 15th day of July, 1994

Carol Amon

Carol Amon, Federal Complaints Investigator

**Case Number: 94:512**

**Status:** Complaint Findings

**Key Topics:** Related Services (Occupational Therapy)
Compensatory Services

**Issues:**

- Whether the district provided occupational therapy in accordance with the IEP.

**Decision:**

- The number of hours of occupational therapy that were provided was significantly less than required on the IEP. The district must provide services as required and 20 hours of compensatory services.

**Discussion:**

- Large caseloads of service providers does not relieve district of its responsibility to provide services.

## FEDERAL COMPLAINT NUMBER 94.512

## FINDINGS AND RECOMMENDATIONS

### I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on June 6, 1994.

B. The complaint was filed by Ms. M. G. on behalf of her son, B.G., against the Weld Board of Cooperative Educational Services, Dr. James A. Miller, Executive Director ("BOCES").

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the BOCES as a recipient of federal funds under the Act. It is undisputed that the BOCES is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. B.G. is a student with disabilities eligible for services from the BOCES under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on August 5, 1994.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint, and consideration of relevant case law and federal agency opinion letters.

### I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the BOCES has violated the provisions of the Act by failing to provide occupational therapy services in accordance with B.G.'s IEPs beginning 1/12/93 through 5/26/94.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18), and (20), and 1414

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.15, 300.16, 300.17, 300.18, 300.121, 300.130, 300.180, 300.235, 300.237, 300.300, 300.340, 300.343 and 300.346

Fiscal Years 1992-94 and 1995-97 State Plans Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the BOCES was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the BOCES, in part, based on the assurances contained within the application.

3. One of the assurances made by the BOCES is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. B.G. was identified as a student with disabilities on IEPs dated 1/7/93, 2/24/94 and 5/5/94. The disabling condition was identified as a physical handicap. All three IEPs, as part of the Educational Service Plan, stated that occupational therapy ("OT") was to be provided to B.G. by an occupational therapist, one hour per week beginning 1/93 and ending 5/95. In addition, physical therapy ("PT") consultation was to be provided by a physical therapist.

5. Ms. M.G., in her complaint, alleges that B.G. has failed to receive the occupational therapy according to the specified time allotment on the IEPs. Instead, she alleges, he averaged one hour to one and one-half hours per month. She is requesting that all the missed sessions be made up and that the BOCES assure this does not happen during the next (1994-95) school year.

6. Dr. James Miller, in the BOCES' response to the complaint, acknowledges the difficulty the BOCES has had in the provision of occupational therapy services. He states that caseloads have been typically large including students who need minimal OT service and that some buildings are over-referring for OT services. During a meeting with BOCES occupational therapists in November, 1993, to discuss this problem with caseloads, it was decided that adding staff was not feasible. Rather, classroom teachers would be given information and activities to prevent over-referrals and students with less severe occupational therapy needs would be moved off the direct service caseloads into consultation services.

7. Occupational therapy caseloads were reviewed again on May 11, 1994 and subsequently the BOCES Board authorized the increase of .5 F.T.E. to the OT staff.

8. The most recent IEP developed for B.G. on May 5, 1994, continued to identify OT as a related service to be provided as a direct service one hour per week during the 1994-95 school year. This indicates that B.G.'s needs for OT services are such that they cannot be met through consultation services, but rather direct services should be continued.

9. Ms. Jill Bonge-Webb, responded to this complaint at the request of Dr. James Miller. She was the occupational therapist responsible, from February of 1993 through May of 1994, for the school B.G. attended. Ms. Webb acknowledged limited direct service time to fully implement B.G.'s IEPs, but stated that she attempted other consultative strategies to compensate for lack of direct services.

10. Ms. Webb provided service logs of her time with B.G. beginning 2/11/93 through the end of the 1993-94 school year. She has indicated that she was to provide 30 minutes of service twice a week on Tuesdays and Thursdays. Utilizing this information along with the school calendar, the following services were provided. Beginning February 11,

1993 there were 104 school days when services were to be provided, according to the IEPs. Direct services were provided on 55 of those days with evaluation and reviews for B.G. on an additional 3 days. Consultative services were provided on 2 days. There were approximately 44 days when no services were provided to B.G. due to OT absences, staffings, family fairs, clinics, and perhaps beginning-of-the-year and end-of-the-year activities. Although there are no logs to document services or the lack thereof prior to 2/11/93, the BOCES was actively seeking the employment of needed occupational therapists.

11. The law is clear that all special education and related services listed in the IEP must be provided in order for the BOCES to be in compliance with the Act. When an IEP lists a specific amount of time for a particular service on the IEP, some adjustments in scheduling the services are possible so long as there is no change in the overall amount of time. However, the amount of time for each of the services cannot be changed without holding another IEP meeting. The IEPs were not changed for B.G., therefore, the BOCES must provide the specified services directly or by contracting with another public or private agency. According to its own documentation, the BOCES failed to provide approximately 20 hours of OT services to B.G. during the period of time covered by the complaint.

## III. CONCLUSIONS

The Weld Board of Cooperative Educational Services did violate the provisions of the Act by failing to provide the amount of occupational therapy services that its IEP team determined was necessary as specified on the IEPs of B.G.

## IV. REMEDIAL ACTIONS

During the 1994 - 95 school year, the Weld Board of Cooperative Educational Services must provide those occupational therapy services specified on the IEP of B.G. In addition, another 20 hours of direct occupational therapy services must be provided during the school year to compensate for those services previously not provided. On or before September 15, 1994, the IEP team must reconvene to determine the manner in which the compensatory services must be provided and how such services will best fit into B.G.'s current education plan.

## V. RECOMMENDATIONS

None.

Dated this 3rd day of August, 1994

Carol Amon

Carol Amon, Federal Complaints Investigator

**Case Number: 94:514**

**Status:** Complaint Findings

**Key Topics:**
Procedural Safeguards (Notice)
Extended School Year
Individual Educational Plan
Free Appropriate Public Education (Out of district placement)
Least Restrictive Environment

**Issues:**

- Whether the school district and the Colorado School for the Deaf and Blind (CSDB) failed to provide procedural safeguards by not providing written notice of IEP meetings and by not releasing educational records in a timely manner.

- Whether the district and CSDB failed to provide FAPE in the least restrictive environment by not developing an IEP in accordance with regulations, not providing special education and related services in accordance with IEPs, not considering various alternative placements and not providing extended school year services.

**Decision:**

- The district and CSDB did provide notice of IEP meetings.

- The IEP was not developed in accordance with regulations.

- Placement at CSDB is considered to be one of the placements available to local districts, but the district did not determine specific education and related services to be provided as part of that placement.

- Extended school year services are not required.

**Discussion:**

- IEPs must state appropriate goals and objectives, specific services and amount of time those services must be provided and the extent that the student is able to participate in regular education.

- Once a student meets the criteria for any disability, he has the right to any special education or related service which meets his needs.

## FEDERAL COMPLAINT NUMBER 94.514

## FINDINGS AND RECOMMENDATIONS

### I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on June 28, 1994.

B. The complaint was filed by Ms. C.S. on behalf of her son M.W., who was placed at the Colorado School for the Deaf and the Blind ("CSDB") by the Thompson R2-J School District ("the district"). The complaint was filed against CSDB, Marilyn Jaitly, Superintendent, Carol Husk, Principal and others and expanded to include the district of residence which, under state law, has responsibility for ensuring the provision of a free appropriate public education (FAPE) when it places a student outside the district.

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-662, the Chapter 1 Part D State Operated or Supported Programs for Handicapped Children, Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 et. seq. (ESEA), and its implementing regulations under 34 C.F.R. 302.64 - 302.66, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act and against CSDB as a recipient of federal funds under ESEA. It is undisputed that the district and CSDB are program participants and receive federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities.

E. M.W. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over some of the allegations contained in the complaint pertaining to violations of federal law and rules in federally funded programs administered by CDE.

G. Parts of the complaint alleging failure to obtain parental consent for dorm changes and failure to pay for telephone calls were not accepted for investigation. Section 504 of the Rehabilitation Act and the Americans with Disabilities Act that prohibit discrimination against persons with disabilities in educational programs are enforced in the school districts by the U.S. Office of Civil Rights of the United States Department of Education, not by CDE. Further, teacher employment and assignment issues raised by the complainant are not covered by the Act.

H. The timeline within which to investigate and resolve this matter expires on August 26, 1994.

I. CSDB provided written response to the complaint. No response was received from the district within the extended timeline of August 10, 1994.

J. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint, and consideration of relevant case law and federal agency opinion letters.

## I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district and CSDB have violated the provisions of the Act, by:

(1) failing to provide procedural safeguards, specifically by:

- not providing written notice of staffing/IEP meetings which include the time and date of the meetings, and
- not releasing educational records in a timely manner; and

(2) failing to provide a FAPE in the least restrictive environment to M.W., specifically by:

- not developing an IEP in accordance with regulations,
- not providing special education and related services including assistive technology, in accordance with the IEPs,
- not considering various alternative placements to implement the IEP, and
- not providing extended school year services.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18), and (20), 1412(6), 1413(a), 1414 and 2794

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.15, 300.16, 300.17, 300.121, 300.130, 300.131, 300.132, 300.180, 300.235, 300.237, 300.300, 300.340, 300.343 300.345, 300.346, 300.501, 300.502, 300.505, 300.550, 300.551, 302.1, 302.2, 302.4, 302.30, and 302.31

Fiscal Years 1992-94 and 1995-97 State Plans Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding. CSDB, as a condition of receiving funds under ESEA, agrees to comply with the Act.

2. The funds were paid to the district and CSDB, in part, based on the assurances contained within the applications.

3. One of the assurances made by the district and CSDB is that, in accordance with the Act, each will provide a free appropriate public education, including special education and

related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. M.W. was identified as a student with disabilities at a triennial review on 10/25/93.

5. Ms. C.S., in her complaint, alleges that CSDB did not provide written notice of staffing/IEP meetings that included the time and date of the meetings.

   a. Records provided by CSDB indicate that staffing/IEP meetings were held for M.W. on 10/25/93, 3/28/94, and 5/19/94.

   b. Records provided by CSDB contained copies of notifications of staffing/IEP meetings as follows:

      - 12/8/92 letter from Barbara Meese inviting parents to participate in an annual review staffing for M.W. to be held on 1/11/93 at 1:20 in Diagnostic & Related Services.

      - 9/28/93 letter inviting parents to participate in a triennial review for M.W. to be held on 10/25/93 at 1:20 in DRS

      - 3/31/94 letter from Barbara Meese inviting parents to participate in a continuation of a review staffing for M.W. to be held on 4/7/94 at 10:00 in the Deaf School Conference Room.

   c. In response to the complaint, CSDB personnel state that an original 1/12/94 staffing was changed to a child study conference with representatives from the Colorado Springs District #11 Talented and Gifted program. The staffing/IEP meeting was then rescheduled with parent approval on 3/28/94. After a 4 hour period of time on 3/28/94, the staffing team, including the parents, agreed to reconvene on 4/7/94. The 4/7/94 staffing was subsequently postponed until 4/22/94 and then until 5/9/94 because M.W. and several of his vocational teachers were in attendance at the statewide technology competition held in Silver Creek.

   d. There is no additional evidence submitted by the complainant to support the allegation of the absence of written notices which include the time and date of meetings.

6. Ms. C.S., in her complaint, alleges that CSDB did not release educational records in a timely manner, specifically the attendance reports indicating M.W.'s non-attendance at Horace Mann Jr. High School and subsequent CSDB in school suspension (ISS) reports.

   a. Ms. C.S. states that she personally asked Carol Husk for copies of ISS reports on 1/12/94. Carol Husk, however, does not recall a verbal request on that date.

   b. Ms. C.S. made a written request for those records on 3/26/94. CSDB personnel indicate that the records were subsequently sent. Ms. C.S. states that she received some of the reports in April.

   c. Ms. C.S. sent a follow-up letter to Carol Husk requesting information on the specific dates of non-attendance and copies of work given. Carol Husk subsequently sent in a timely manner, a copy of M.W.'s attendance report from Horace Mann Jr. High School. Copies of work assignments are not kept as part of the educational record.

7. Ms. C.S., in her complaint, alleges that CSDB did not develop an IEP in accordance with regulations, specifically the annual goals. She states that the annual measurable goals submitted by service providers were placed in the IEP after the staffing, not written or prepared while she was present.

   a. CSDB, in its response to the complaint, states that the annual goals were developed at the time of the staffings on 10/25/93, 3/28/94 and 5/9/94. CSDB also states that short term objectives were either developed or submitted at the time of the staffings, except on 3/28/94 when Ms. C.S. requested that several CSDB teachers leave the staffing.

   b. A copy of the 10/25/93 IEP submitted by Ms. C.S. indicates that seven annual goals were developed at the time of the staffing/IEP meeting. There is no indication, however, that short term measurable objectives were developed or submitted. In its response to the complaint, CSDB did not provide documentation of the short term objectives or annual goals.

   c. A copy of the 5/9/94 IEP submitted by Ms. C.S. indicates that four annual goals were developed at the time of the staffing/IEP meeting. There is no indication, however, that short term measurable objectives were developed or submitted. In its response to the complaint, CSDB did not provide documentation of the short term objectives or annual goals.

   d. The law is clear in that an IEP must include statements of annual goals including short-term instructional objectives and that the objectives must be written before placement. A review of records does not suppot the complainant's contention that annual goals were not written at the staffing/IEP meeting, however the review does indicate that short term instructional objectives were not written at the meeting as part of the annual goals.

8. Ms. C.S. in her complaint alleges that CSDB did not provide special education and related services including assistive technology, in accordance with the IEPs. She specifically cites the non provision of the math and English classes from August through mid October as well as the non provision of a TAG program, computer time, speech therapy and a Transonic hearing (assistive technology) device.

   a. M.W.'s IEP dated 10/25/93 states that the recommended placement is "CSDB with mainstream at Mann D#11" No specific special education or related services are listed. Characteristics of service include:

      *investigate and initiate mainstream opportunities, suggested: programming with non-handicapped students, athletics, clubs/organizations, field trips, recreation, TAG classes*
      *use peer tutoring opportunities...*
      *formal math, science, language instruction a minimum of 4X a week*
      *speech therapy 3 X a week , 20-30 minutes a week*
      *total communication environment*
      *methods and materials adapted for deaf*
      *continue school based and community based counseling 1 X per week and as needed*
      *explore group activities and interaction with other gifted students*
      *conduct at least quarterly child study conferences...*
      *assist parent in finding speech therapy for summer through private resources...*
      *encourage computer use for individualized projects and for work that needs to be timed.*

b. M.W.'s IEP dated 3/28/94 and continued on 5/9/94 states that the recommended placement is "CSDB with VOC-ED focus". No specific special education or related services are listed. Characteristics of service include:

*consistency in rules/consequences with focus on earning "positives"*
*provide many opportunities to learn through hands-on experiential activities*
*short-term (not delayed) consequences*
*highly structured environment and schedule*
*opportunities to work independently*
*ensure M.W. is challenged with work that he is interested in and motivated by*
*consider opportunity to participate in "art therapy" through District 11*
*inter-disciplinary educational program with vocational/technology focus*
*provide opportunities for direct contact with service providers as needed*
*include self-paced activities with goal setting and accountability.*
*additional COS related to giftedness listed on attached pages*
*offer assistance to family in obtaining funding for summer enrichment*
*speech therapy 2 X week maximum 20 minutes per session*
*utilize techniques and strategies identified as being effective with gifted students*
*develop tangible plan to document regression in speech skills*
*arrange inservice for comm. tm./teachers on transonic hearing device*
*high expectations*
*reading language resource consult related to needs of gifted/talented*
*quarterly child study conferences.*

c. The law is clear in stating that an IEP must include a statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs. The IEP must include all of the specific special education and related services needed by the child and the services must be listed in the IEP even if they are not directly available from the local agency. All services in the IEP must be provided by the agency or through contract or other arrangements in order for the agency to be in compliance with the Act. In addition, the amount of time to be committed to each of the various services to be provided must be stated in the IEP so that the level of the agency's commitment of resources will be clear to all who are involved in both the development and implementation of the IEP. The IEP also must include a statement of the extent that the child will be able to participate in regular educational programs. One way of meeting this requirement is to indicate the percent of time the child will be spending in the regular education program with non disabled students. Another way is to list the specific regular education classes the child will be attending.

d. The district of residence is responsible for ensuring that an IEP is developed for a student within its jurisdiction and also is responsible for ensuring that appropriate special education and related services are provided in accordance with the IEP, even when it places a student outside the district. Prior to determining placement for a student, the district must determine what specific special education and related services need to be provided to the child and the extent that the child will be able to participate in regular educational programs. Placement out of district then would occur when that placement was the least restrictive environment in which the specific special education and related services could be provided.

Thompson R2-J School District, the district of residence in this case, must assure that an IEP has been developed which states the special education and related services needed as well as the extent that the child is able to participate in regular education. Recommended placement into a special residential school program such as CSDB

should be made based on the determination that CSDB can provide the special education and related services needed, as well as the opportunity to participate in regular education.

e. IEPs for M.W. indicate that no specific special education (including vocational education) or related services (including assistive technology) were determined prior to recommending placement at CSDB. Once placement was made, CSDB then determined what services would be provided and the extent the student would participate in regular education. The IEPs state that the recommended placement is CSDB and then go on to add such things as "with mainstream at Mann D#11" and "with Voc Ed focus". However, none of the IEPs indicate the specific instructional or related services to be provided and the amount of time the student will participate in regular education.

There is some indication of specific services mixed in with the "Characteristics of Service"; however many characteristics of services are not then converted to specific services.

For example, the following statements found in the IEP would be characteristics of service:

*use peer tutoring opportunities...*
*methods and materials adapted for deaf*
*provide many opportunities to learn through hands-on experiential activities*
*short-term (not delayed) consequences*
*consistency in rules/consequences with focus on earning "positives"*
*provide opportunities for direct contact with service providers as needed*
*ensure M.W. is challenged with work that he is interested in and motivated by*
*utilize techniques and strategies identified as being effective with gifted students*
*include self-paced activities with goal setting and accountability.*

The following statements found in the IEP should more appropriately be listed as specific special education and related services to be provided, prior to determining actual placement:

*formal math, science, language instruction a minimum of 4 X a week*
*speech therapy 3 X a week , 20-30 " a week*
*speech therapy 2 X week maximum 20 minutes per session*
*conduct at least quarterly child study conferences*
*arrange inservice for comm. tm./teachers on transonic hearing device.*

The following statements found in the IEP are not clear and should be translated into specific special education and related services including the amount of time each is to be provided:

*investigate and initiate mainstream opportunities; suggested: programming with non-handicapped students, athletics, clubs/organizations, field trips, recreation, TAG classes.*

The specific amount of time in regular education should be determined by the IEP team.

*continue school based and community based counseling 1 X per week and as needed*

The specific amount of counseling services should be determined by the IEP team. If the team uses the term, "as needed", it must indicate the criteria for determination of need and who will make that decision.

*explore group activities and interaction with other gifted students*
A student's participation in a gifted program should be determined by an IEP team along with members of the gifted program present.

*consider opportunity to participate in "art therapy" through District 11*
The word "consider" should be defined so as to know who will make the decision and how it will be made.

*inter-disciplinary educational program with vocational/technology focus*
This should specifically be determined by the IEP team.

*reading language resource consult related to needs of gifted/talented*
The specific amount of consultation should be determined by the IEP team.

f. Based on the above and the lack of delineation of specific services, the following was determined by this investigation to be the specific services relating to the concerns of the complainant:

Math and English from August through mid October
*Formal math instruction a minimum of 4 X a week.*
There is no reference in the IEP to English.

TAG Program
*Investigate and initiate... TAG classes. Explore group activities and interaction with other gifted students. Additional COS related to giftedness listed on attached pages. Utilize techniques and strategies identified as being effective with gifted students.*
There is no reference to the specific amount of time to be spent in the TAG program or in exploration or interaction. There is no listing of specific accommodations or modifications to be made or strategies to be utilized.

Computer Time
*Encourage Computer use.*
There is no specific amount of computer time listed.

Speech Therapy
*Speech therapy 3 X a week for 20-30 minutes, speech therapy 2 X week with a maximum of 20 minutes per session.*
This is specific.

Transonic hearing (assisstive technology) device
*Arrange inservice for comm. Tm./teachers on transonic hearing device*
This deals with inservice training, but not the provision of the device.

According to CSDB's response to the complaint, M.W. did participate in math during the first semester, receiving a grade of "D+" and during the first quarter of the second semester, receiving a grade of "F". M.W. participated in English class receiving a grade of "F" for the first semester and a grade of "D" during the first quarter of the second semester. A Gifted and Talented Individual Educational Plan was developed for M.W. on 3/28/94 with the evaluation indicating the "inability to proceed without therapy and student responsibility". No information was provided on the "encouragement of computer use" other than a grade card indicating M.W. participated in a Computer Lit class during the second quarter of the second semester, receiving a grade of "A-". A copy of the speech

therapist's schedule indicates that time was scheduled for M.W. No information was provided on the "arrangement of inservice on transonic hearing device" but an audiological report recommends the use of a school-provided Phonic Ear auditory trainer.

9. Ms. C.S. in her complaint, alleges that CSDB did not consider various alternative placements to implement the IEP. Specifically, Ms. C.S.' s concerns were the lack of various alternative "placements" available within CSDB, not placement alternatives considered by the district of residence. Ms. C.S. currently is strongly supportive of M.W.'s "placement" in the Vocational School on the CSDB campus, but is not supportive of "placement" in the Deaf School. She states that Vocational School was not offered as an alternative "placement" until she personally contacted staff at the Vocational School.

   a. IEPs dated 10/25/93, 3/28/94 and 5/9/94 indicate that the only placement alternative considered by the district was special residential school. The 10/25 IEP also lists District #11 mainstreaming and TAG program; the 3/28/IEP also lists District #11 Art therapy.

   b. None of the IEPs indicated "placement" alternatives within the special residential school program other than the consideration of services in District #11. In response to the complaint, CSDB states that various program options were implemented to meet M.W.'s IEP goals including: regular CSDB programming to include mainstreaming, opportunities for M.W. to tutor in the elementary department, specialized individual projects, classroom modifications and behavior modifications, art therapy, full day programming in CSDB's Vocational Department with an emphasis on technology and the integration of academic and vocational instruction, and mental health therapy.

   c. The use of the word "placement" by the complainant is not placement as it relates to FAPE. There is no documentation that the district of residence considered placement alternatives other than the special residential school; and the district did not delineate the specific special education and related services as well as the extent of participation in regular education prior to determining placement at CSDB. CSDB's responsibility, once M.W. was placed there, was to provide the specific services listed on the IEP; however, there were no specific services listed. CSDB did not have responsibility to consider various alternative "placements" within CSDB.

10. Ms. C.S. in her complaint, alleges that CSDB did not provide extended school year (ESY) services. Specifically she states that speech therapy was not provided during the summer to make up for the time it was not implemented by CSDB during the school year. CSDB indicates that speech therapy was not provided due to absences.

    a. The purpose of an ESY is to preserve skills learned and educational benefits accrued during the regular school year. The purpose is not to confer additional educational benefit. Also, ESY is not a vehicle for making up for absences or services not provided during the regular school year.

    b. All IEPs for M.W. indicate that Extended School Year services were not recommended for M.W. The 3/28/94 IEP submitted by Ms. C.S. has both "yes" and "no" checked for "recommended for ESY", while a copy of the same IEP submitted by CSDB has only "no" checked. This IEP was continued, however, on 5/9/94 and ESY is not indicated on either the copy submitted by CSDB or by Ms. C.S. Regardless, there is no evidence to suggest that M.W. qualified for ESY services.

c. If a specific amount of speech therapy services were designated on the IEP, the law is clear that those services must be provided, however services need not be provided to make up for absences. CSDB could choose to provide speech therapy as a related service during the summer to make up for services listed on the IEP which they did not provide, if that were the case. Characteristics of service on M.W.'s IEPs indicate a specific amount of time speech therapy was to be provided as a related service. CSDB in its response to the complaint, however, indicates that these service were not provided due to M.W.'s lack of attendance. There is no clear evidence regarding the issue of speech therapy services, however, it is clear that ESY services were not to be provided.

11. A review of the documents concerning M.W.'s education indicates many discrepancies.

a. Although M.W. is significantly above average in his verbal skills and in his ability to learn, he is failing classes and significantly under achieving.

b. M.W.'s participation in speech therapy was dependent upon his mood and whether or not the activity was of high interest and required low teacher directives. He was often absent from speech therapy.

c. Participation in a gifted and talented program in the public school was unable to proceed due to M.W.'s "rude and unacceptable" behavior. Parents and school personnel have expressed concern regarding the frequency and intensity of M.W.'s emotional outbursts. M.W. has expressed his unhappiness with school and with life in general and has expressed suicidal thoughts. Yet, the question of M.W.'s qualifying for services for students who have a significant identifiable emotional disorder is being raised by teachers and educational staff at CSDB with parents disagreeing with the suggestion of an emotional disorder. Once a student meets the criteria for any disability, he or she has the right to any special education or related service which meets his or her unique needs. M.W. has met the criteria for a hearing disability. He does not have to meet an additional criteria for emotional disorder in order to receive appropriate services relating to his social/emotional/behavioral needs.

d. Recommendations on the CSDB Student Assessment Report for M.W. dated 10/93-6/94 include the discontinuance of some services until behavior is more compliant, strategies for altering the environment to prevent behavior outbursts, strategies for calming M.W. when angry and strategies for providing consequences for inappropriate behavior. The focus appears to be on controlling behavior and altering the environment to prevent inappropriate behaviors so that instruction in academics can take place. There is no indication of the need for instructionally differentiated programming to help M.W. to acquire more acceptable replacement behaviors.

## III. CONCLUSIONS

1. The district and CSDB did not violate the Act by failing to provide written notice of staffing/IEP meetings which include the time and date of the meetings. Written notifications by CSDB did provide the time and date. Although there was no written notice for the staffing/IEP meeting held on 3/28/94, that meeting was originally to be held on 1/12/94 and was rescheduled with parental approval.

2. CSDB did not violate the Act by failing to release educational records in a timely manner. CSDB did release educational records upon written request. Those records about which the complainant is concerned are not considered to be part of the educational record.

3. The district and CSDB did violate the Act by failing to develop an IEP in accordance with regulations. Specifically, IEPs were not developed for M.W. which included (a) annual goals with short-term instructional objectives and appropriate objective criteria and evaluation procedures and schedules for determining whether the short term instructional objectives are being achieved, (b) statements of the specific special education and related services to be provided including the amount of time to be committed to each of the various services and (c) a statement of the extent M.W. will be able to participate in regular educational programs.

4. Because the district and CSDB did not determine the specific special education and related services to be provided including the amount of time to be committed to each of the various services, it is not possible to ascertain whether or not they violated the Act by not providing those services. IEPs, records and reports concerning the education of M.W. do indicate, however, that M.W. is not functioning at his potential and that behavior interferes with academic progress. "Special education" means specially designed instruction to meet the unique needs of a student with a disability; and the current individual education plan does not appear to be effective in meeting M.W.'s unique needs.

5. CSDB did not violate the Act by not considering various alternative placements within CSDB to implement the IEP since "placement" at a special school such as CSDB is considered to be one of the alternative placements available to local districts. The district, however, does appear to have violated the Act by not determining the specific special education and related services to be provided as well as the extent M.W. can participate in regular education, prior to placing M.W. at CSDB and as a basis for selecting CSDB from other alternative placements.

6. CSDB did not violate the Act by not providing extended school year services. The staffing/IEP teams indicated on all IEPs that ESY services were not recommended.

7. As stated in M.W.'s student assessment report conducted by staff at CSDB, it is critical that school staff and M.W.'s parents work together to develop a creative plan for supporting M.W.'s needs. M.W.'s needs are complex and cannot be described as typical of children who are deaf or who are gifted.

## IV. REMEDIAL ACTIONS

On or before September 16, 1994, Thompson R2-J School District and CSDB must hold a review staffing/IEP meeting to design an individual educational plan (IEP) for M.W. The IEP must contain those items listed under 34 C.F.R. 300.346. The question as to M.W.'s meeting criteria for an emotional disability need not be addressed, as he has met the criteria for a hearing disability. The IEP team must consider goals, objectives and instructional services relating to M.W.'s social/emotional/behavioral needs as well as his speech, auditory and academic needs. Placement must then be determined, based on the IEP. Services must then be provided in accordance with the IEP.

On or before September 30, 1994, the district and CSDB must provide this office with a copy of the above referenced IEP.

## V. RECOMMENDATIONS

It is recommended that the IEP team include professionals with experience in instructionally differentiated programming for students with social/emotional/behavioral needs and professionals who understand the needs of students who are gifted and talented. It is also highly recommended that school personnel and parents work cooperatively in the development of this plan and not as adversaries. If necessary, CDE could provide the services of a behavioral consultant, a consultant in gifted and talented and/or a professional mediator to assist the parties in developing an effective IEP.

Dated this 24th day of August, 1994

Carol Amon, Federal Complaints Investigator

**Case Number: 94:517**

**Status:** Complaint Findings

**Key Topics:** Individual Educational Plan

**Issues:**

- Whether the district complied with provisions on the IEP to provide parents with weekly grade reports.

**Decision:**

- Weekly grade reports were provided by the district.

**Discussion:**

- Dates and methods of transmitting grade reports were an issue.

## FEDERAL COMPLAINT NUMBER 94.517

## FINDINGS AND RECOMMENDATIONS

### I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on September 28, 1994.

B. The complaint was filed by Ms. Q.M. on behalf of her daughter, M.M., against the Ouray R-1 School District ("the district"), Mr. Joe Cooper, Superintendent and Mr. Don Binder, Director of Special Education, Montrose District RE-1J, with whom the district contracted for the administration of special education services.

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district and the contracted special education administrative district ("the respondents") as recipients of federal funds under the Act. It is undisputed that the respondents are program participants and receive federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. M.M. is a student with disabilities eligible for services from the respondents under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on November 28, 1994.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint, and consideration of relevant case law and federal agency opinion letters.

### I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the respondents have violated the provisions of the Act by failing to provide a free appropriate public education ("FAPE")by not giving regular weekly feedback through grade reports to the special education teacher and parents in accordance with the modifications/accommodations listed as part of M.M.'s IEP.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) and (20), and 1414

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.15, 300.17, 300.18, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the respondents were receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the respondents, in part, based on the assurances contained within the application.

3. One of the assurances made by the respondents is that, in accordance with the Act, they will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within their jurisdiction to meet the unique needs of that child.

4. M.M. was identified as a student with disabilities on a 32 page individual educational plan ("IEP") developed on March 3, 4, 10, 17 and 18, 1994. That IEP states the following:

   "Modifications/Accommodations #9: Provide regular weekly feedback (by Wednesday)through grade reports to Special Ed teacher/parents."

5. Ms. Q.M., in her complaint, alleges that the district did not, by the fourth Wednesday of the 1994-95 school year, provide any weekly feedback report.

6. The district's opening date for the 1994-95 school year was September 6, 1994. Weekly reports would therefore have been due on September 14, 21, 28 and October 5.

7. Ms. Virginia Ficco, Principal of Ouray School, in response to the complaint, provided the following information regarding these reports:

   September 14: M.M. was absent on September 13 and 14; therefore the weekly grade report due on the 14 would have reflected work completed during the first four days of the school year. The special education teacher expected a week's worth of time in class before a weekly report would be issued.

   September 21: On September 21 the principal contacted the special education teacher and told her to make certain that the weekly grade was prepared and mailed that afternoon. She insisted that the regular education teachers provide the special education teacher with the information she needed so the report could be mailed that afternoon. The principal saw the teachers confer with the special education teacher and saw the report being put into an envelope. She did not see it mailed, but has no reason to believe that is was not. In a telephone conversation between the principal and Q.M. on September 27, there was no notice that the one prepared on September 21 had not been received. The principal sent a copy of the grade report as part of the complaint response.

September 28: On September 29, the principal asked the special education teacher for a copy of the September 28 weekly report. She took a Xeroxed copy out of a file folder at about 7:55 a.m. on the 29th when asked for evidence that it had been prepared. The principal does not know what happened to the copy mailed to Q.M. The principal sent a copy of an undated grade report as part of the complaint response.

October 5: The grade report for October 5 was Faxed and Ms. Q.M. acknowledged receipt to the secretary to the Superintendent.

8. According to the principal, a letter from the district to Ms. Q.M. was hand delivered to her at her home on October 11th at 3:50. That letter states that copies of weekly grade reports will be Faxed to her home on Wednesdays between 3:00 p.m. and 4:00 p.m. Should a report not be received, Q.M. is to call the school by noon on Thursday. If no such call is received, the school will assume the grade report was received.

## III. CONCLUSIONS

The Ouray R-1 School District and Montrose District RE-1J, with whom the district contracted for the administration of special education services, did not violate the provisions of the Act by failing to provide a free appropriate public education by not giving weekly feedback through grade reports to the special education teacher and parents in accordance with the modifications/accommodations listed as part of M.M.'s IEP. Although there is a difference of opinion as to expectations regarding the first grade report the respondents did substantially comply with their requirements of the IEP in providing subsequent reports.

## IV. REMEDIAL ACTIONS

None.

## V. RECOMMENDATIONS

None.

Dated this 28th day of November, 1994

Carol Amon

Carol Amon, Federal Complaints Investigator

**Case Number: 94:518**

**Status:** Complaint Findings

**Key Topics:** Related Services (Occupational Therapy)

**Issues:**

- Whether the district failed to provide occupational therapy in accordance with the IEP.

**Decision:**

- The district failed to provide the services on the IEP.

**Discussion:**

- The district has had difficulty in finding licensed personnel to provide OT services, however this does not relieve the district of the requirement to comply with the IEP.

**FEDERAL COMPLAINT NUMBER 94.518**

**FINDINGS AND RECOMMENDATIONS**

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on October 17, 1994.

B. The complaint was filed by Mr. and Mrs. N. on behalf of their daughter, B.N., against the Holyoke RE-1J School District, Ms. Jeanne S. Howes, Superintendent ("the district") and the Northeast Board of Cooperative Educational Services, Dr. Willard Holthus, Executive Director and Mr. Roger Piwowarski, Director of Special Education ("BOCES").

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district and the BOCES as recipients of federal funds under the Act. It is undisputed that the district and the BOCES are program participants and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

E. B.N. is a student with disabilities eligible for services from the district and the BOCES under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on December 16, 1994.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint, and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district and the BOCES have violated the provisions of the Act by failing to provide a FAPE to B.N., specifically by not providing occupational therapy ("OT") services in accordance with B.N.'s IEPs.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18), and (20), and 1414

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.15, 300.16, 300.17, 300.18, 300.121, 300.130, 300.180, 300.235, 300.237, 300.300, 300.340, 300.343 and 300.346

Fiscal Years 1992-94 and 1995-97 State Plans Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the district and the BOCES were receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district and the BOCES, in part, based on the assurances contained within their application.

3. One of the assurances made by the district and the BOCES is that in accordance with the Act, they will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within their jurisdiction to meet the unique needs of that child.

4. B.N. was identified as a student with disabilities on an IEP dated 8/23/94. That IEP indicates that B.N. is to receive O.T. as a related service at Holyoke Elementary, 2 hours per week beginning 8/94. The responsible person for those services is to be an occupational therapist as part of the staff.

5. Mr. and Mrs. N., in their complaint, alleged that B.N. failed to receive any OT services as identified on the IEP (a total of fourteen hours) as of the week of October 10, 1994. They requested that OT services be provided during the remainder of the school year and that compensatory services be provided for those missed services. They indicated their willingness to drive for these services with the proper compensation for travel time and expense, if the BOCES is unable to provide an occupational therapist at the school.

6. Mr. Roger Piwowarski, in the BOCES' response to the complaint, acknowledges the difficulty the BOCES has had in the provision of OT services. He indicated that he would be presenting four options to the BOCES Board on October 24, 1994, relative to contracting for OT services or advertising for an occupational therapist at a salary outside the salary schedule.

7. Correspondence between Mr. Piwowarski and the complainants, Mr. and Mrs. N., on October 18 and 20, 1994, indicates an attempt to provide for contracted services but the need for clarification of some issues.

8. Correspondence from Mr. Piwowarski dated November 1, 1994, indicates that the BOCES has contracted with K. K., a private occupational therapist, to provide OT services 1 and 1/2 hours every other week, and with C. M. of the Sterling Regional Med Center ("SRM") to provide one hour of service per week, each as their schedule permits. Mr. and Mrs. N. are to be reimbursed for their travel expenses in taking B.N. to and from OT services at the standard district rate. However, there was no agreement as to reimbursement for personal time. The arrangement with C. M. is temporary as she will be going on maternity leave in January and SRM has no immediate plans for covering her caseload.

9. The district has been in session 15 weeks as of 12/9/94. According to B.N.'s IEP, she is to have received 2 hours of OT services each week for a total of 30 hours of service to date.

10. Mrs. N. indicated on 12/14/94, that B.N. has received 3 1/2 hours of OT services to date at SRM, and that she is being reimbursed for transportation costs but not personal time. Mrs. N. is concerned about the lack of reimbursement for her personal time (3 hours each session), and also about what will happen when the current occupational therapist takes maternity leave. Mrs. N. also indicated that B.N. has received OT services from K. K., in school, 2 times this school year.

11. Mr. Piwowarski indicated on 12/15/94, that the amount of OT services reported by Mrs. N. (above) is correct and that he will not be reimbursing Mrs. N. for personal time. He, too, is concerned about what will happen when the SRM occupational therapist takes maternity leave. He is exploring various options but notes the lack of availability of occupational therapists in the northeast region of the state; and even when they are available, they are not interested in obtaining an educator license. He indicated that the BOCES is not in a financial position this year to go outside its current salary schedule to advertise for an occupational therapist which would need to occur to attract an occupational therapist. This will be considered for next year. Mr. Piwowarski again acknowledged the BOCES' obligations to provide OT services to B.N. and willingness to provide compensatory services to B.N. this summer for those services not provided during the school year.

12. An annual review of the IEP of B.N. held on 12/7/94, again, indicated that OT is to be provided 2 hours per week as a related service.

13. The law is clear that all special education and related services listed in the IEP must be provided in order for the district and the BOCES to be in compliance with the Act. When an IEP lists a specific amount of time for a particular service on the IEP, some adjustments in scheduling the services are possible so long as there is no change in the overall amount of time the service is provided. The district and the BOCES must provide the specified services directly or by contracting with another public or private agency. According to its own documentation, the district and the BOCES are currently attempting to provide OT services to B.N. in accordance with her IEP but are failing to provide the full amount of service and may experience additional difficulty in January or February.

## III. CONCLUSIONS

The Holyoke RE-1J School District and the Northeast Colorado Board of Cooperative Educational Services did violate the provisions of the Act and are continuing to violate the provisions of the Act by failing to provide a FAPE to B.N. in that the full amount of occupational therapy services that its IEP team determined was necessary as specified on the IEPs of B.N. have not been provided. As of 12/9/94, B.N. was to receive 30 hours of OT services but has received only 6 hours of service. This office recognizes the efforts made by the director of special education to obtain OT services, and the limitations of availability and problems with licensure. However, this does not relieve the district and the BOCES of its responsibility to fulfill the provisions of the Act.

## IV. REMEDIAL ACTIONS

The Holyoke RE-1J School District and the Northeast Colorado Board of Cooperative Educational Services must immediately provide those occupational therapy services specified on the IEP of B.N. Additionally, they must provide compensatory services for those services not provided to date. The district and the BOCES must do whatever is necessary to obtain the OT services specified on the IEP.

On or before January 6, 1995, the district and the BOCES must provide this office with documentation of the employment of an occupational therapist or the procurement of the necessary services through contract or other arrangements, along with their plan for the provision of compensatory services.

Optional Settlement: Should the above not be possible, the complainants have indicated their willingness to agree to the following, so long as the district and BOCES continue to demonstrate a good-faith effort to obtain OT services:

> On or before May 26,1995, the IEP team must reconvene to determine the amount of OT services provided during the school year; and if discrepant from the amount listed on the IEP, determine how compensatory OT services will be provided including services during the summer of 1995. The district and BOCES must then provide those services.
>
> On or before June 1, 1995, the Holyoke RE-1J School District and the Northeast Colorado Board of Cooperative Educational Services must provide this office with an accounting of the OT services provided to B.N. during the school year and their plan for the provision of compensatory services.

This optional settlement, if utilized, must be stated in writing with signatures of the complainants, district and BOCES, and a copy of the agreement must be provided to this office on or before January 6, 1995.

Dated this 16th day of December, 1994

Carol Amon, Federal Complaints Investigator